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# **TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1959**

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**No. 513**

**UNITED STATES, PETITIONER,**

**VS.**

**CANNELTON SEWER PIPE COMPANY**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

**PETITION FOR CERTIORARI FILED NOVEMBER 4, 1959**

**CERTIORARI GRANTED DECEMBER 14, 1959**

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CANNELTON SEWER PIPE COMPANY

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**IN THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT**

CANNELTON SEWER PIPE COMPANY, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant

On Appeal from the Judgment of the United States District  
Court for the Southern District of Indiana

**Appendix to Brief for the Appellant**

[fol. 1] IN UNITED STATES DISTRICT COURT, SOUTHERN DIS-  
TRICT OF INDIANA, INDIANAPOLIS DIVISION

No. IP-57-C-163

CANNELTON SEWER PIPE COMPANY, a Corporation,

vs.

UNITED STATES OF AMERICA

**DOCKET ENTRIES**

6-28-57 Complaint filed. Summons issued. Also files  
Cost Bond with U.S. Fidelity & Guaranty Co. as surety  
thereon.

7-9-57 U. S. Marshal returns summons. Served July  
2, 1957.

8-27-57 U. S. Attorney files Answer to Plaintiff's com-  
plaint, with proof of service.

12-23-57 Assigned for pre-trial conference on Tuesday,  
January 7, 1958 at 3:00 P.M. (SE)

Assigned for trial on January 13, 1958. (SE)

1-7-58 Pre-trial Conference held. Counsel to prepare  
entry.

1-31-58 Assigned for Court trial Tuesday, March 11,  
1958 at 9:30 A.M. (SE)

## DOCKET ENTRIES—Continued

2-12-58 Court enters pre-trial order of conference held on January 7, 1958; cause ordered set for trial in March 1958 and trial briefs to be filed one week before trial date (SE) Copies mailed.

2-20-58 Parties file Stipulation of Facts No. 1.

3-3-58 Government files Notice of taking of Deposition, with acknowledgment of service.

[fol. 2] 3-3-58 Plaintiff files Pre-trial Memorandum-brief, with proof of mailing.

3-5-58 Defendant files pre-trial brief.

3-7-58 U. S. Attorney files certificate of mailing of Pre-trial brief filed March 5, 1958.

3-11-58 Court trial commenced. Opening statements made. Evidence on behalf of plaintiff is heard in part. Some evidence on behalf of defendant heard in part. Hour for adjournment having arrived, Court is adjourned until tomorrow at 9:30 A. M. (SE)

3-12-58 Trial resumed. Additional evidence on behalf of plaintiff and defendant heard and concluded. No rebuttal evidence offered. Court continues this matter for briefing and final argument. Court grants plaintiff three weeks after receipt of transcript to file post trial brief. Defendant granted ten days thereafter to file answer brief, and plaintiff ten days thereafter to file reply brief. Parties to submit proposed Findings of Fact and Conclusions of Law, and entry. Court adjourned. (SE)

4-14-58 Plaintiff files Post Trial Brief, with proof of service.

4-28-58 U. S. files its post trial brief, with proof of service.

5-7-58 Plaintiff files Reply Brief with proof of service. Plaintiff submits proposed Findings of Fact and Conclusions of Law.

6-19-58 Assigned for Final Argument on Wednesday, June 25, 1958 at 2:00 P.M. (SE)

6-23-58 Parties file Stipulation, waiving argument and submitting cause.

6-25-58 Court files its Findings of Fact and Conclusions of Law. Court enters order that Plaintiff recover of and from the defendant the sum of \$79,280.01 together with all [fol. 3] costs of this proceeding and second cause of action is hereby dismissed. (SE) Copy to attorneys.

# DOCKET ENTRIES—Continued

8-22-58 United States Attorney files Notice of Appeal.

9-25-58 Government, Defendant-Appellant, files Motion for extension of time within which to file and Docket Record on Appeal, with proof of service.

9-26-58 Court grants Government's Motion for extension of time within which to file and docket record on appeal. Time extended an additional 50 days. (SE)

## IN UNITED STATES DISTRICT COURT

FINDINGS OF FACTS AND CONCLUSIONS OF LAW—Filed June 25, 1958

The above entitled cause came on for trial to the Court. The evidence was heard on March 11, and 12, 1958, concluded and continued for briefing and final argument thereafter. The briefs were filed as follows: plaintiff's on April 14, 1958; defendant's answer brief on April 28, 1958; and plaintiff's reply briefs on May 7, and 14, 1958. The matter was set for final argument for June 25, 1958 and the parties in writing waived final argument on June 24, 1958.

The Court having duly considered the evidence and being fully advised in the premises now finds the following:

### FINDINGS OF FACTS

1. The defendant admits by its answer all of the jurisdictional allegations of plaintiff's complaint as to the Court's jurisdiction of the persons and subject matter. These facts will not be repeated but the allegations of the pleadings pertaining thereto are adopted herein by reference.

[fol. 4] 2. The plaintiff paid to the defendant at the office of its Indianapolis Collector of Internal Revenue the following taxes which are in issue:

A. Excess profits tax for the fiscal year ending November 30, 1950 in the amount of \$3,487.72 plus interest thereon of \$25.78 on the following dates:

October 31, 1951

\$3,363.15;

September 2, 1954

\$ 124.57; and

September 2, 1954

\$ 25.78.



4  
B. Income tax for the fiscal year ending November 30, 1951 in the amount of \$53,649.93 plus interest on a part thereof of \$3,911.85 on the following dates:

May 13, 1951	\$16,825.56;
July 13, 1954	\$36,824.37 and
July 13, 1954	\$ 3,911.85.

3. The defendant admits by its answer that plaintiff duly filed with said collector various amended returns and claims for refund for the said tax payments and interest all as alleged in plaintiff's complaint. These facts will not be repeated but the allegations of the pleadings pertaining thereto are adopted herein by reference.

4. The defendant admits by its answer that it disallowed all of plaintiff's claims for refund of said tax payments and interest all as alleged in plaintiff's complaint. These facts will not be repeated but the allegations of the pleadings pertaining thereto are adopted herein by reference.

5. All of the admitted allegations of plaintiff's complaint by defendant's answer are adopted herein by reference.

6. The plaintiff is a corporation organized under the laws of the State of Indiana, having its principal place [fol. 5] of business in the City of Cannelton, Perry County, Indiana.

7. During the tax years in question the plaintiff was engaged in the business of mining fire clay and shale from an underground mine owned and operated by it; transporting the minerals in trucks a distance of 1.5 miles to a plant owned and operated by it in Cannelton, Indiana; where it used said minerals in producing vitrified sewer pipe, flue lining and related vitrified products; and which products were sold by plaintiff to various purchasers in the Central United States.

8. The clay and shale referred to in item 7 were adjacent strata deposits beneath a thin vein of coal.

The clay was a "refractory or fire clay" having a pyrometric cone equivalent of 19 to 26.

The proportions in which plaintiff mined and used the fire clay and shale were 60% fire clay and 40% shale.

9. All of said fire clay and shale mined by plaintiff during said time was used by plaintiff in producing said prod-

ucts, except for the sale of approximately 80 tons of ground fire clay and shale in bags for a total price of \$1822.45, or an average price of \$22.88 per ton.

During plaintiff's fiscal year ending November 30, 1951, plaintiff mined a total of 38,473 tons of fire clay and shale, and plaintiff's net sales of manufactured products in such fiscal year amounted to \$1,499,145.66.

10. All of the processes used and applied by plaintiff to the fire clay and shale which it mined and used, were processes normally applied by mine owners or operators who are engaged in the manufacture of vitrified clay sewer pipe and related products.

11. Plaintiff has never sold any of its raw fire clay or shale and has never purchased any fire clay or shale for use in its production of said products.

[fol. 6] 12. There was no market for the fire clay and shale mined by plaintiff before it was processed into said products, except for negligible amounts of fire clay and shale sold in bags.

13. The first "commercially marketable mineral product" of the fire clay and shale mined by plaintiff during the years in question was the said finished products.

14. The plaintiff for its fiscal year ending November 30, 1950 had an excess profits net income of \$199,689.06 with an excess profits credit of \$142,227.24.

The plaintiff is entitled to carry back to the fiscal year ending November 30, 1950 the unused excess profits credit from the fiscal year ending November 30, 1951 in the amount of \$31,446.31. This is because of the depletion allowance to which plaintiff is entitled for the fiscal year ending November 30, 1951 which results in a reduction of plaintiff's excess profits net income for such year to \$110,780.93.

This amount of unused excess profits credit, being greater than the adjusted excess profits net income for the fiscal year ending November 30, 1950, results that the plaintiff had no adjusted excess profits net income for its fiscal year ending November 30, 1950 and owed no excess profits tax for such year and has overpaid in the sum of \$3,513.50.

15. The plaintiff is entitled to a deduction for depletion for the fiscal year ending November 30, 1951 in the amount of \$88,908.13, and plaintiff was liable for income and ex-



cess profits taxes for such fiscal year in the amount of \$51,141.07 and has paid an additional sum of \$57,561.78.

#### CONCLUSION OF LAW

7. The Court has jurisdiction of the persons and subject matter of this action.

[fol. 7] 2. The law is with the plaintiff and against the defendant on the issues of the first cause of action and the answer thereto.

The law is against the plaintiff and for the defendant on the issues of the second cause of action and the answer thereto in so far as it conflicts with the first cause of action and answer thereto.

3. Plaintiff's processing of the mined minerals during the years in question were the ordinary treatment processes normally applied by mine owners and operators in order to produce the commercially marketable mineral products within the meaning of Section 414(b)(4)(B) of the Internal Revenue Code of 1939, as amended.

4. Plaintiff's "gross income from the property" is plaintiff's net sales (F.O.B. its plant, loaded for shipment) of the finished products from said minerals.

5. Plaintiff is entitled to a deduction for depletion during its fiscal years equal to 15% of 60% of its "gross income from the property", and 5% of 40% of its "gross income from the property", limited to 50% of its "net income (computed without allowance for depletion) from the property."

6. Plaintiff has overpaid its excess profits tax for the fiscal year ending November 30, 1950 in the total sum of \$3,513.50.

Plaintiff is entitled to recover such sum of \$3,513.50 from the defendant together with interest thereon at the rate of 6% per annum on the following amounts and from the following dates to the date of judgment herein:

on \$3,363.15 from October 31, 1951; and  
on \$ 150.35 from September 2, 1954.

Total \$3,513.50 principal.

[fol. 8] 7. Plaintiff has overpaid its income tax for the fiscal year ending November 30, 1951 in the total sum of \$57,561.78.

Plaintiff is entitled to recover such sum of \$57,561.78 from the defendant together with interest thereon at the rate of 6% per annum on the following amounts and from the following dates to the date of judgment herein:

on \$16,825.56 from May 13, 1951;  
and on \$40,736.22 from July 13, 1954.

8. The second cause of action should be dismissed.

The Clerk is directed to enter judgment in accordance with these findings of facts and conclusions of law and the plaintiff is awarded its costs taxed by the Clerk in the sum of \$\_\_\_\_\_.

Dated this 25 day of June, 1958.

(S.) Cale J. Holder, Judge, United States District Court, Southern District of Indiana.

IN UNITED STATES DISTRICT COURT

JUDGMENT ENTRY--JUNE 25, 1958

The Court having filed its Findings of Facts and Conclusions of Law and Order for Judgment:

Now, therefore, pursuant thereto, It Is ADJUDGED, that the plaintiff recover from the defendant the sum of \$79,280.01 together with all costs of this proceeding taxed by the Clerk in the sum of \$\_\_\_\_\_.

It is Further Ordered, that the second cause of action be and it is dismissed.

Dated this 25 day of June, 1958.

(S.) Cale J. Holder, Judge, United States District Court, Southern District of Indiana.

[fol. 9]      IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Aug. 22, 1958

Notice is hereby given that the United States of America, the above named defendant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment of this Court entered in this action on June 25, 1958.

Don A. Tabbert, United States Attorney, by: (S)  
Philip R. Melangton, Jr., Assistant United States  
Attorney.

[fol. 10] IN UNITED STATES DISTRICT COURT

**Transcript of Testimony**

**APPEARANCES**

The plaintiff appeared by and through its counsel, Royse & Travis, by Howard P. Travis and Thomas A. Hendrickson.

The defendant appeared by and through its counsel, Ernest C. Friesen, Jr., Department of Justice, Washington, D. C., and John C. Vandivier, Assistant United States Attorney.

Be it Remembered, That in the United States District Court for the Southern District of Indiana, Indianapolis Division, at the United States Court House in the city of Indianapolis, Indiana, on the 11th day of March, 1958, at 9:45 o'clock a.m., the above-entitled cause being at issue came on for trial before the Honorable Cale J. Holder, Judge of the said Court, and the proceedings upon the trial are in the words and figures following, to-wit:

**COLLOQUY BETWEEN COURT AND COUNSEL**

The Court: Will the Clerk call the case, please.

The Clerk: Indianapolis 57-C-163; Cannelton Sewer Pipe Company versus United States of America.

Mr. Travis: (For Pltf.) The plaintiff is ready, your Honor.

Mr. Friesen: (For Deft.) The defendant is ready, your Honor.

The Court: Yes, Mr. Vandivier.

Mr. Vandivier: (For Deft.) May it please the Court, I would like to introduce, or reintroduce Mr. Ernest C. Friesen, of the Department of Justice, Washington, D. C., who is head counsel and will try the Government's side of the case. This is Mr. John Stafford, with the Internal Revenue Service of Cleveland, Ohio, who will be at the table with Mr. Ernest Friesen. I, myself, your Honor, will be in [fol. 11] and out, if I may have the Court's permission, inasmuch as I will not be needed at all by Mr. Friesen.

The Court: All right. Do you want to introduce your parties?

Mr. Travis: (For Plff.) I would like to have you know Mr. Thomas Hendrickson, who is a partner in our firm.

The Court: Are you prepared for opening statements? Have you talked to counsel on the other side?

Mr. Travis: (For Plff.) I think, your Honor, there may be a slight misunderstanding now as to what the Court told us yesterday. I repeat again I had an expert witness on clay mineralogy who was coming here from the Ceramic Engineering Department of Ohio State University. Unfortunately he is involved at the present time with a funeral in his family, and reported to us Sunday that he would not be able to be here. Yesterday I appeared with Mr. Vandivier before your Honor and requested that the case be continued for that purpose, and my understanding of the Court's suggestion, which both sides agreed to, was that the plaintiff would proceed with its case except for Dr. Everhart, who is the witness I referred to, and that the defendant would then enter its case, and then the case would be continued for two purposes, as I understood: one, to receive the testimony of Dr. Everhart at a later date; and secondly, for the plaintiff to enter its rebuttal to the Government's defense today.

The Court: First, their defense to that expert's testimony.

Mr. Travis: (For Plff.) And that the Government would have an opportunity to answer anything Dr. Everhart testified to.

The Court: Is that your understanding, Mr. Vandivier? [fol. 12] Mr. Vandivier: (For Deft.) That is my understanding. The only point I believe we may have disagreed on: there was not any set time the plaintiff and defendant would finish today, necessarily, but the method of procedure inasmuch as Dr. Everhart could not be present.

The Court: Is that agreeable to you, sir?

Mr. Friesen: (For Deft.) Yes, your Honor, as long as there is some latitude in a technical case like this in rebutting or showing from Dr. Everhart's testimony that the Government's position is correct.

I have talked to Dr. Everhart, and I would be as happy as they are to have him testify. I believe he is a very well qualified expert; however, gathering the information upon

which the expert testimony is based may require further testimony as to what products are actually produced in the surrounding area, and we may need to call persons to testify as to sales of certain types of material after this testimony is completed.

The Court: Well, as I understood the arrangement, upon receipt of the expert's testimony at some future date the Government would have the full opportunity to offer any evidence in defense of that particular subject. We don't have a jury here, and we can exercise some discretion and latitude, both sides.

Mr. Travis: (For Pltf.) Your Honor, the thing I am a little concerned on this resumption of trial is during the interval, while the case is continued, I will wish to rebut the Government's case to the best of our ability with evidence. It wasn't my understanding, and I would not wish it to be so, at that time the Government can still come in with some evidence on this marketability, which we then would also not know about at that time.

Mr. Friesen: (For Deft.) If the Court please, I showed to [fol. 13] Mr. Travis this morning the affidavit of some further information that I wanted to present in affidavit form. Mr. Travis properly wants to cross-examine those persons. I do not anticipate further evidence of marketability will be necessary unless Dr. Everhart states this particular material is of some special kind, in which case we will need to bring in special witnesses.

The Court: The Court understands sometimes we can not plan the whole thing out completely, and we are going to have to decide at the time when the issue comes up. Generally we are in agreement on the subject that the expert witness's testimony can be offered at some other time. The Government will have an opportunity to respond to that with some evidence to meet that and rebuttal and surrebuttal will be at some future date.

Mr. Travis: (For Pltf.) I think, your Honor, there is a lawyer I would like to present. Judge, this is Jerry Luptak, attorney from Detroit, Michigan, who is here as an observer and is interested because he has similar cases.

The Court: You are not participating in this case?

Mr. Luptak: No.



# OPENING STATEMENT OF MR. TRAVIS

Mr. Travis: (For Plt.) Your Honor is somewhat familiar with the issues before the Court because of the pre-trial conference which was held in January and briefs which each side has filed since. I will make a short opening statement and simplify those issues as they are before the Court today.

The question involved is the amount of the allowance for depletion to which the plaintiff is entitled in computing the income tax for the fiscal year ending November 30, 1951, because of the mining by it and the use by it in manufacturing of clay and shale, which I will call fire clay and shale, and the Government will call clay and shale.

[fol. 14] The applicable provisions of the Internal Revenue Code of 1939, which apply in this case are this: That any taxpayer engaged in mining, in this instance fire clay and shale, is entitled to a deduction from its gross income in computing its net income for tax purposes of an amount equal to 15 per cent in the case of fire clay, and 5 per cent in the case of shale of the gross income from mining.

Mining is further defined in the statute as meaning not merely the extraction of the minerals from the ground, which we normally think of in mining, but is also to include any processes applied by the mine owners and operators normally in order to produce a commercially marketable product.

Many cases have been tried over the country to define what we mean by "gross income from mining" and what we—what the statute means Congress meant by "a commercially marketable product." Those cases resulted in various appeals and decisions by four Circuit Courts of Appeals and the Tax Court all in favor of the taxpayer on the theory that the taxpayer was entitled to apply the percentages for depletion purposes to the net sales of its manufactured products loaded and ready for shipment. Those cases, some of the representative ones, were then joined by the Government in a petition for certiorari in the Supreme Court, and that petition was denied last October. That was the end of the theory of the Government, which was being used in those cases to the effect that the finished brick and sewer pipe, both of which were involved in those appeals, were not mineral products, and that, therefore, you had to go to some prior step in the manufacturing process and cut



it off and find out what your costs were at that point. So, we have no question here that sewer pipe is a mineral product within the meaning of the statute.

At the pre-trial conference, which was held before you, [fol. 15] Honor, the Government stated that the issues which would be contested in this case, being different from any case which has ever been tried before, would be in relation to the marketability of some product prior to a piece of sewer pipe in the Cannelton Area where the plaintiff's plant is located, and that if they were successful in showing such a market, it would be necessary, of course, to inquire into the representative market price for that earlier product.

I assume from conferences with counsel for the Government that the earlier product to which they refer is raw clay as it is scooped out of the mine. On that issue we will show that no clay of the type suitable for manufacturing vitrified sewer pipe is now, or has been, sold in the Cannelton Area; that the plaintiff has never sold clay as such; that the plaintiff has never purchased clay as such. It has been until this very day either mining its own clay with its own machinery and manpower, or it has contracted with someone else to mine that clay and haul it to its plant for stipulated prices per ton on land in which the plaintiff had an economic interest.

The plaintiff will also show that it can not, by virtue of the economies of its manufacturing processes, afford to buy clay and have it hauled to its mine—have it hauled to its plant in any distance farther than 10 to 12 miles; that the rates for hauling are prohibitive; that the product is a low gross margin product; that the clay, itself, is a considerable factor in the price which the plaintiff must receive for that product, and, therefore, the clay which the plaintiff uses must of necessity be a very cheap, laid-down cost to it.

After the pre-trial conference, and when counsel were negotiating together on a stipulation of facts, the Government for the first time stated that it would raise and contest another issue of fact. That issue is that the Government [fol. 16] will now apparently attempt to contest the fact that the clay as distinguished from shale, which the plaintiff used in the fiscal Year, 1951, was in fact not fire clay. On that issue there will be introduced in evidence by the plaintiff a deposition, taken last Saturday, of Dr. Hayden H. Murray, who was formerly head of the Indiana Geological

Survey for seven years, who is probably the outstanding authority in the entire United States on clays, and plants using clays, in the State of Indiana. In addition to that the plaintiff will have Mr. Eugene Clemens, an officer of the plaintiff, who has devoted his life similarly to clay mineralogy. The plaintiff will also, depending upon the defendant's evidence I might say, introduce the testimony of Dr. J. O. Everhart, who is the head of the Ceramic Engineering Department at Ohio State University, and who also is one of the few recognized clay mineralogists in the entire country.

What evidence the defendant intends to introduce on the question of fire clay I do not know, and I can't conceive.

In the Government's brief counsel referred, in discussing the regulations of the Treasury Department regarding this question, to that more or less general part of those regulations regarding cases where a mineral is not sold at the mine head or oil head such as an oil is. And the regulation has been in force for some years, and it states simply that where there is no selling price, but there is a market at the well head or mine head, then we must look for a representative market or field price to find the value of the clay for the purposes of depletion. That regulation is all well and good as far as it goes; but fire clay was added as a mineral subject to percentage of depletion in the Internal Revenue Code in 1950, effective January 1, 1951. For seven years the Internal Revenue Service has labored with the problem [fol. 17] of what is fire clay. During that time they have had the benefit of experts' advice, definitions, and other, from all over the country, all industries using fire and refractory products. At two places during this seven years they have come out with a definition. The first in 1954 was a simple and easy application. It stated that fire clay would be considered a fire clay if it had a solid pyrometric cone equivalent of 15 or higher. That regulation continued in effect for a couple of years and, perhaps due to loss of revenue and because of the simplicity of the regulation, the Internal Revenue Service issued a new regulation on fire clay, revoking the prior one. This regulation is denominated "Revenue Ruling 56-59," and in this regulation the Service abandoned the pyrometric cone equivalent test as a test for fire clay and, instead, substituted a test relating to the use to which the clay was put. If it was used for a

refractory purpose, then it would be considered fire clay within the meaning of the Code. And the regulation went on to state briefly what it meant by "refractory purpose"; and one of those purposes contained in the regulation stated this:

"It is recognized that under certain circumstances fire clay may be used in conjunction with ordinary clay and still be used for refractory purposes, such as when certain amount of fire clay is blended with ordinary clay in order to produce the vitrified clay sewer pipe."

Again reading:

"Clay used or sold for use as a refractory clay entitled to 15 per cent depletion."

Again reading:

"Fire clay is used to enable sewer pipe to retain its shape and dimensions under extremely higher temperature required for vitrification is considered to be used as refractory clay."

That regulation is, so far as Treasury Regulations are the law, the law today. That is the regulation that is in force at this moment, and it states in unmistakable terms that fire clay used to add strength and other properties to sewer pipe is a refractory clay, and is entitled to 15 per cent depletion.

The plaintiff, under both definitions that have been issued by the Treasury Department on this subject, falls clearly within the definition of fire clay and is entitled to the 15 per cent depletion rate. Because of the unavailability of those regulations, I would like to have the Court have this one which is the Treasury Regulation.

Thank you, your Honor.

The Court: Mr. Friesen.

#### OPENING STATEMENT OF MR. FRIESEN

Mr. Friesen: (For Deft.) Your Honor, apparently Mr. Travis, from his remarks before the Court, is not intending to challenge the validity of the regulation which provides that where there is a field or market price, that that field or market price shall control in determining the first com-

mercially marketable product of a pit or mine. His remarks, indicating the regulation is older than the particular provisions of the statute, brings out what has been recognized many times by the Supreme Court as a factor of interpretation; that is, where a regulation has stayed in effect while the statute is modified and the regulation is not dealt with, that it at least indicates congressional intent not to tamper with the regulation or change its effect. Now, in dealing with this particular aspect of the case, the first problem: What is the first commercially marketable mineral product of this particular mine owner's mine or operator's [fol. 19] mine? I would like to refer directly to that regulation, Regulation 29.23 M-1(f)(3):

"If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, gross income from the property means the amount for which such property was sold."

They have indicated here, and we would concede, that they have sold only a negligible part of their own particular production and do not come within the meaning of that section. But the regulation goes on to say:

"If the product is transported or processed other than by ordinary treatment processes before sale, gross income from the property means the representative market or field price of a mineral product of like kind and grade."

That, your Honor, presents the problem which is before the Court . . .

The Court: (Interposing) I appreciate you are answering Mr. Travis. But in the opening statement do we need to get into a legal argument? Let's confine it to an opening statement, and we will have final argument.

Mr. Friesen: (For Deft.) Basically, the Government intends to prove not only is there a market for crude clay of a like kind and grade to what the taxpayer produces, but what the taxpayer produces does not come within the commonly understood meaning of the term "fire clay."

This conclusion as to fire clay is based upon the proposition that the taxpayer presented to the Government in its argument before the Appellate Staff. It presented chemical

analyses of a pyrometric cone equivalent of 17, and the great weight of the evidence, and the literature on the sub-[fol. 20] ject, indicates that the low-duty fire brick loses its refractory use there. It needs a Cone 19 equivalent.

The American Society for Testing Materials, a well recognized authority on the subject, printed this Standard in several different places in its most recent publications.

The one problem which appears most apparent is that taxpayer asserts there is no market for the product of its mine which is representative of the market in the Cannelton Area. Of course, any market presents economic factors and problems of proof. To prove a market means we would apparently have to bring in every person who ever purchased or ever sold to show what the market is for. We have tried to select representative sellers and purchasers to bring before Court to indicate what the market is and where it is.

Mr. Travis indicates he will prove it would be uneconomical to transport clay from Brazil, Indiana, where clay is sold daily in large-ton lots, to the Cannelton Area. The economics of the situation will also be a matter of proof and the Government will offer evidence to show the average cost, including a profit, of transporting clay is 1.8 cents per ton mile. The Government will further demonstrate at that price, comparing with the price that was paid by the taxpayer to haul clay, they could haul clay considerable distances.

We can also show, I believe, and Mr. Travis is not unaware of the proof we intend to offer, since we offered it by deposition taken in his presence, that there were actual sales of large volumes of clay in the Cannelton Area, and, in fact, this taxpayer now purchases all its supply of clay from a distance of eight miles away. And in the Year 1951, the year in suit, the Owensboro Sewer Pipe Company, making a competitive product, hauled clay taken from a pit near [fol. 21] where they now get their clay, some 30 miles from Owensboro, to manufacture sewer pipe. And in 1951 they had what is a purchase agreement. Now, not intending to get into a legal argument, I can understand and anticipate the answer which counsel will make to this particular proposition. L. R. Chapman was the deponent, and he testified that he owned some 3,000 acres of land on the Kentucky side of the Ohio River, just south of Cannelton, and that he made



arrangements with these ceramic producers to sell them clay, and the arrangement was always couched in terms of a contract for mining and delivery. Mr. Chapman would sell or transfer by lease for a nominal consideration, anywhere from One to Fifty Dollars, the title or lease-hold on the property, and at the same time, and as a condition of transferring that land, would take a contract to mine and deliver clay. He would not transfer the land without having this right to mine and deliver. He was in fact, and is now in fact, mining and delivering clay to the taxpayer for the purpose indicated. The Government shall contend that this constitutes a market.

We are not asserting here or raising any issue of who has the economic interest in the particular lease-hold or basic land. That is a problem involved in depletion, but fortunately, we don't have it here. We are not involved in that legal problem. But the fact situation it forms, the substance of what the transaction which occurs, there is the people need clay, they go out and pay a price for it, and they get that clay delivered to their plants for that price.

In 1951 there is strong evidence of this "purchase," we typify it, of clay materials satisfactory for use in their plant within eight miles of Cannelton, Indiana. And with these two propositions, we will rest our case.

The Court: Call your first witness.

[fol. 22] The Plaintiff, to maintain the issues in its behalf, offered and introduced the following evidence, to-wit:

Mr. TRAVIS: (For Pltf.) Your Honor, may I have Stipulation No. 1, which I believe should be in the file?

(Court tenders stipulation to Counsel.)

Mr. Travis: (For Pltf.) Does the Court wish to have this identified?

The Court: I believe I would.

(The plaintiff, for purposes of identification, handed the reporter a certain document for marking and which was by said reporter marked Plaintiff's Exhibit No. 13.)

Mr. Travis: (For Pltf.) Plaintiff now offers in evidence, Plaintiff's Exhibit 13, a stipulation by the parties.

(Plaintiff's Exhibit No. 13 was offered in evidence by Mr. Travis at this time.)

The Court: Any objection?

Mr. Friesen: (For Deft.) No, your Honor.

The Court: Is that your stipulation?

Mr. Friesen: (For Deft.) That is the stipulation of facts which we have executed and is filed with the Court.

The Court: Exhibit 13 is admitted, read, and exhibited in evidence.

(Plaintiff's Exhibit No. 13 is admitted and read into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following, to-wit:)

(Here Insert.)

[fol. 23] EUGENE C. CLEMENS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions By Mr. Travis:

1 Q. State your name and where you reside, please.

A. I am Eugene C. Clemens. I live at Cannelton, Indiana.

2 Q. What is your occupation, Mr. Clemens?

A. I am Vice-President of the Cannelton Sewer Pipe Company.

3 Q. Do you hold an office with any other companies or corporations?

A. Yes. I am Vice-President of the Texas Vitrified Pipe Company, Mineral Wells, Texas.

4 Q. What duties do you perform with Cannelton Sewer Pipe Company as Vice-President?

A. In general administrative, production, and technical duties.

5 Q. What specifically do you deal with in those duties?

A. You mean in production?

6 Q. Yes. — research, whatever you—What I want to know: What do you do in relation to the clay you use in that plant?

A. I am in charge of the production methods, and also in charge of all technical work of that company.

7 Q. Do you have any college degrees, Mr. Clemens?



A. Yes. I have a Bachelor of Science in Ceramics from the University of Illinois, and Master of Science in Ceramic Engineering from the same school.

8 Q. Are you a professional engineer, registered professional engineer in any state?

[fol. 24] A. I am a registered professional engineer in the States of Indiana and Texas.

9 Q. What societies do you belong to that deal with ceramics?

A. I am a Trustee of the American Ceramic Society, a national ceramic organization; I am a member of the American Society of Testing Materials; I am a Trustee of the National Clay Pipe Research Corporation; I am a member of the Advisory Committee of the National Clay Pipe Manufacturers, Inc.'s Research Committee.

10 Q. How long have you been connected with the Cannelton Sewer Pipe Company?

A. For about thirty years.

11 Q. During that time have you been in charge of all of their research as to clay and the use thereof in their business?

A. I have.

12 Q. What does the Cannelton Sewer Pipe Company make for sale?

A. We make, the Cannelton Sewer Pipe Company makes vitrified clay sewer pipe, vitrified wall coping, flue lining, and filter block.

13 Q. Are you familiar with the clay pits or mines and the plants which use clay in their manufacturing in Southern Indiana and Northern Kentucky?

A. I am familiar with all of the plants in those areas.

14 Q. Have you in your work, particularly on sewer pipe, traveled extensively throughout the country and visited other plants?

A. I have visited practically every sewer pipe plant in the United States.

15 Q. How many sewer pipe producers are there in the State of Indiana?

A. There are four.

16 Q. In the plaintiff's Complaint, Mr. Clemens, at [fol. 25] paragraph 20, there are set out various processes which apply by Cannelton Sewer Pipe Company to the clay

which it mines in order to produce a finished vitrified product. Are those processes the ones that customarily and normally are used by the other producers of vitrified sewer pipe throughout the United States?

A. Yes.

17 Q. Reducing those processes greatly, would you tell the Court in simple language what you do to that clay in order to, after it is mined, in order to produce a vitrified sewer pipe?

A. It is transported from the mine to the plant, where it is pulverized, and prepared to the proper grain size, mixed with water to the proper consistency, extruded into the form of clay products, dried, and fired by our special firing process.

18 Q. Now, in the grinding, that clay gets about as fine as talcum powder, doesn't it?

A. Correct.

19 Q. And when you mix it with water, you get a very thick mud out of it. Isn't that the way it is?

A. What we describe as a plastic mass.

20 Q. And when you extrude it, as you call it, you form it into the shape of a piece of sewer pipe?

A. Formed into the shape of the finished product.

21 Q. And that is done on automatic presses or machines?

A. Automatic and semi-automatic.

22 Q. And when you speak of drying, your first drying process, that is before it goes in a kiln, is that so?

A. Yes.

23 Q. And how is that process accomplished?

A. That drying process is accomplished by carefully regulating the heat to the ware, after it has been placed in dryers where we can control the heat, and the [fol: 26] humidity, by processes we have learned in production to obtain a product which is free from defects and can be properly fired.

24 Q. What does that drying do to the extruded piece of pipe?

A. It essentially removes all the water we add in the process of previous manufacturing process.

25 Q. It does not remove any other mineral or substance whatsoever except the water you have added?

A. It makes no other change.

26 Q. Now, you speak of firing this piece of pipe. What do you do when you fire it?

A. After the ware is placed in the kilns, it is subjected to heat treatment within those kilns in order to properly control the shrinkage and to bring the ware to the stage of vitrification, or the hardened state, where it will be a finished product.

27 Q. Why do you have to dry the pipe at a reasonably low temperature before you put it in the kiln?

A. Because if we dry it at a temperature higher than 212 degrees, we would form steam within the kiln and destroy it.

28 Q. Are there any dangers connected with the drying process? Could I do it in the kitchen if I threw heat on this wet mass?

A. I don't think you could do it with any degree of skill.

29 Q. What might happen to it, if I didn't do it right?

A. You would ruin the ware.

30 Q. In what respect?

A. Probably blowing it up, breaking it.

31 Q. It would crack?

A. It would crack, yes.

[fol. 27] 32 Q. And the heat inside the kiln you raise by gradual control process?

A. Yes.

33 Q. Temperature?

A. Yes.

34 Q. What is the maximum temperature that you reach in the kiln for vitrification?

A. For the clay in question that was 2200 degrees Fahrenheit.

35 Q. When you say "that" you are referring to clay used in 1951?

A. 2200 degrees Fahrenheit.

36 Q. How long does the drying process you have described take?

A. The drying process depends on the size of the ware, and it will take anywhere from 12 hours to three weeks; the larger the ware, the longer the drying time.

37 Q. And how long a time is the ware in the kiln?

A. The ware in the kiln requires from 60 to 210 hours,

depending on the size, for the firing process, after which the ware must be heat treated by careful cooling.

38 Q. And after you are through firing it in the kiln, when the kiln is cooled off, you haul it out and load it and store it?

A. It is graded and either hauled to shipping conveyances, or put in storage.

39 Q. What materials was your company mining in 1951?

A. We were mining a fire clay and a shale.

40 Q. Where was the mine in relation to your plant?

A. The mine was about 1.4 miles from the plant on Indiana State Highway 237.

41 Q. Was that an open pit or underground mine?

A. It was an underground mine.

[fol. 28] 42 Q. How long prior to '51 had that mine been used by your company?

A. That mine was opened in 1937.

43 Q. What do you mean by "shale"?

A. Shale is a form of clay which is thinly laminated or stratified.

44 Q. You say shale is a form of clay?

A. Yes.

45 Q. What do you mean by "fire clay"?

A. Fire clay is an aggregate of minerals which is irregularly deposited. By that I mean it is not stratified or consolidated into the form of layers as compared with shale.

46 Q. It, too, is a clay; is that right?

A. It is a clay, yes.

47 Q. What is clay?

A. Clay is an aggregate of minerals, and those minerals are hydrous silicates of alumina.

Mr. Travis: (For Pltf.) Your Honor, I am not going to introduce these in evidence, but I want him to show the Court what these products are. (Counsel referring to a sample of shale and a sample of fire clay).

48 Q. (By Mr. Travis) What is the piece of rock I am handing you?

A. This material is a shale.

49 Q. And how do you tell that?

A. By its laminae or its character where it is laid down in thin sheets.

50 Q. And what is this material?

A. This is a fire clay.

51 Q. How do you distinguish it from that?

A. By its irregular method of laying down, by the evidence of roots that were grown into it at the time it was deposited, which indicates that it was laid down under a coal.

[fol. 29] 52 Q. Are these two samples which I just handed to you actual samples from the mine from which you were extracting clays in 1951?

A. Yes.

53 Q. How did those materials in 1951 lie in their natural deposits?

A. As I told you before, we mine underground. There was a thin layer of coal. Directly underneath that thin layer of coal is about six feet of fire clay. Directly below that was the shale.

54 Q. How thick was the shale bed?

A. That was probably two to four feet. It varied slightly.

55 Q. And in your mining out of that mine in 1951, did you remove and use both of those strata or veins of fire clay and shale?

A. Yes, we mined them together.

56 Q. So that the materials which you have used in making your products contain both fire clay and shale in about the proportions of six feet to an average of three feet. Is that true?

A. The average proportion was about 60 per cent fire clay and 40 per cent shale.

57 Q. You were present at the taking of the deposition of Dr. Haydn Murray on last Saturday, were you not?

A. Yes.

58 Q. And you heard him testify as to the properties and location of fire clays in the State of Indiana?

A. Yes.

59 Q. Do you agree or disagree with any of the statements which he made in that regard?

A. I agree with his statements.

60 Q. What do you call this strip of fire clay that runs through Southern Indiana?

[fol. 30] A. The fire clay through Southern Indiana that

we are using, and the only strip of fire clay in Southern Indiana, is described geologically as the Pennsylvania Clays.

61 Q. And what do you mean by the Mansfield formation?

A. That is a division or grouping within the Pennsylvanian age.

62 Q. Was your mine in 1951 in what is called the Mansfield formation?

A. Yes.

63 Q. Does a piece of vitrified sewer pipe have to be made from fire clay or part fire clay?

A. It depends entirely on the nature of the materials that you have. It is possible to make sewer pipe without fire clay, but it is much better to use fire clay.

64 Q. In this particular area, where your sales of finished products are made, in order to be competitive on the quality basis, would it be necessary for you to use fire clay or partly fire clay?

A. Yes.

65 Q. Why?

A. Because it is needed to control the manufacturing and the firing processes.

66 Q. The clays which are used for the production of your finished sewer pipe, must they have any, what is called plasticity?

A. Yes.

67 Q. Why?

A. If they were not plastic, it would not be possible to form them with the processes and the machinery which we have.

68 Q. What do you mean by "plasticity"?

A. Plasticity is the property of becoming sticky or workable when wet with water.

69 Q. For example, just before your clay goes into [fol. 31] the extrusion process, could you form it with your hands and fingers?

A. You could form it into a shape, which piece would retain its shape after being formed. Is that what you mean?

70 Q. Yes. I mean it is soft.

A. It is soft and pliable.



71 Q. Now, must the clay which you use in producing sewer pipe have any particular characteristics regarding its drying qualities?

A. That is one of the most important characteristics in the manufacturing processes inasmuch as if you can not control the drying, you can not successfully make sewer pipe, and it is necessary to properly blend the clays and to properly process them in order to get successful drying, or to have successful drying.

72 Q. Don't all clays dry the same?

A. No, they do not.

73 Q. So that you have to use the clay that has particular drying qualities?

A. Yes.

74 Q. How about the firing of the pipe in the kiln? Does that require any special qualities in the clay?

A. Very special qualities inasmuch as the mineral characteristics of the clay and its ability to withstand high temperatures must be known and carefully controlled.

75 Q. And here, again, can any piece of clay be fired?

A. No, it can not. It can be fired, but not successfully.

76 Q. Can it be vitrified?

A. Not successfully, not any clay. It requires special characteristics.

77 Q. You call your product a vitrified clay sewer pipe. What do you mean by "Vitrified"? What is "Vitrified"? [fol. 32] A. Means it is fired to a very hard or glazy state.

78 Q. And here, again, do different clays have different qualities as to vitrification?

A. Very much so; depends entirely upon the natural characteristics of any particular clay.

79 Q. Supposing you were exhausting a clay pit at the present time, what would you have to do find another suitable mineral to use in making vitrified sewer pipe?

A. We would have to do considerable prospecting, first, to find enough material to use, and second, we would have to do considerable laboratory pilot plant and production testing in order to prove any deposits which we might locate.

80 Q. How do you do that?

A. In prospecting we usually engage the services of a



geologist to locate a definite—to advise us on the geology of the area and to make initial locations. We then either drill or excavate into the deposits in order to determine their extent and if, after the extent has been determined, it is necessary to carry the samples into our laboratory or a recognized ceramic laboratory and have ceramic tests of all types made to determine the suitability of that material to manufacturing purposes, for manufacturing purposes.

81 Q. It has been stated in the opening statements that your company is now obtaining its supply of clay and shale from Hancock County, Kentucky. Is that true?

A. Yes.

82 Q. To what extent did you, and whomever you had employed with you, prospect and carry on research in Hancock County, Kentucky, before you found a suitable clay?

A. We investigated the deposits of Hancock County, prospected and tested them for a period of about five years. [fol. 33]

83 Q. When did you start getting material from Kentucky?

A. I think it was in January or February of 1947; I am not sure of the exact date.

84 Q. It was just last year?

A. Last year.

85 Q. Is there still clay and shale deposits left in the mine that you were using adjacent to Cannelton?

A. There are some, yes.

86 Q. It was not because you ran out of clay, then, that you switched to Kentucky?

A. No.

87 Q. What do you mean by pyrometric cone equivalent?

A. Pyrometric cone equivalent is a ceramic test used to measure the fusion point of a clay.

88 Q. Would you tell the Court briefly what you do when you make this test?

A. You make this test, small cones about like a small wedge, probably an inch and one-half long, are made from the clay in question, clay to be tested, and these are fired with cones which have been prepared by a recognized laboratory, which have definite melting points, so that the clay in question, when it fuses, can be compared with the fusion point of a known material or a known cone.

89 Q. And at a certain P.C.E.?

A. P.C.E. is the measure of the temperature and heat treatment of a particular clay.

90 Q. Have you, throughout the years of using the particular mine in question in 1951 and the one across the road from it which was opened later, had tests made of that clay?

A. Yes, we have.

91 Q. Both P.C.E. and chemical analyses?

[fol. 34] A. We have had P.C.E. and chemical analyses and ceramic tests made.

92 Q. What is the P.C.E. of the fire clay which you were mining in 1951?

A. Our average tests show it to be Cone 20.

93 Q. Some of those tests have been as low as 19?

A. Some have been as low as 17, and some as high as 26.

(The plaintiff, for purposes of identification, handed the reporter certain documents for marking, and which were by said reporter marked plaintiff's Exhibit No. 14 and No. 15.)

94 Q. (By Mr. Travis) I hand you what has been identified as Plaintiff's Exhibit 14, and ask you to state what that is.

A. This is a report of a test by The Bruce Williams Laboratories, of Joplin, Missouri, on a test made to determine the pyrometric cone equivalent of fire clay and shale which was taken from the Cannellton Sewer Pipe Company mine in 1953.

95 Q. Will you identify Exhibit 15, please?

A. Exhibit 15 is a chemical analysis by The Bruce Williams Laboratories in Joplin, Missouri, dated January 7, 1954, on the fire clay taken from the deposits of the Cannellton Sewer Pipe Company.

96 Q. Are those two reports the same—in regard to the same samples of clay?

A. Yes.

97 Q. Then just tell the Court, please, what the pyrometric cone equivalent was of the two samples reported in Exhibit 15.

The Court: (Interposing) Do you have any objection to the exhibit? He is starting to read the contents.

Mr. Travis: (For Pltf.) I will make the offer of the exhibits at this time.

[fol. 35] (Plaintiff's Exhibits No. 14 and No. 15 were offered in evidence at this time by Mr. Travis.)

Mr. Friesen: (For Deft.) I object to the admission of this Exhibit unless the witness can identify from his own personal knowledge that the samples were taken from the clay, rather than the shale, since there is a different percentage applied to the two.

Mr. Travis: (For Pltf.) He testified it was fire clay.

Mr. Friesen: (For Deft.) May I take him on voir dire, then?

Mr. Travis: (For Pltf.) Sure.

Mr. Friesen: (For Deft.) How do you know these were clay rather than shale?

The Witness: Because I saw the samples taken from the mine.

Mr. Friesen: (For Deft.) Did you take the sample?

The Witness: I did not. I saw them after they were taken. They were taken by our Superintendent.

Mr. Friesen: (For Deft.) And what method of sampling was used?

The Witness: In the case of the fire clay, it was a typical cross-section of the vein.

Mr. Friesen: (For Deft.) Now, you are referring to 665763?

The Witness: Yes.

Mr. Friesen: (For Deft.) And the other was a shale?

The Witness: Yes, 764 was the shale.

Mr. Friesen: (For Deft.) I have no objection.

The Court: All right, Exhibits.

Mr. Friesen: (Interposing for Deft.) Excuse me, your Honor. If it is determined by the Court that the materials taken in '53 and '54 are relevant to this case in showing quality—and I think that we may have this problem in a number of instances as to date since no one knew in 1951 [fol. 36] we were going to have a lawsuit on this case—I will have no objection; but if we are restricting our evidence entirely to the Year 1951, I make my objection to this on that ground.

The Court: What do you say about his objection?

Mr. Travis: (For Pltf.) I will clear that question up in this immediate regard.

The Court: Do you have some further questions?

Mr. Travis (For Pltf.) Yes.

98 Q. (By Mr. Travis) The mine from which you were extracting clay in 1951, was that abandoned by you, your company?

A. Yes.

99 Q. When?

A. I believe in 1952, in the Spring of 1952.

100 Q. And what did you do then?

A. We opened another entry into the same vein at a different location so as to reduce the amount of haulage to the face of the mine.

101 Q. As a matter of fact, the second mine that you opened was practically across the road from the other one.

A. Directly across the highway.

102 Q. And you say it was the same vein of clay?

A. Yes.

103 Q. And did it have the same general qualities and characteristics?

A. Yes.

Mr. Travis: (For Pltf.) With that, your Honor, I will renew my offer.

(Plaintiff's Exhibits No. 14 and No. 15 were reoffered in evidence at this time by Mr. Travis.)

Mr. Friesen: (For Deft.) You testified this was not from the same mine, I believe as you originally had in 1951. [fol. 37] The Witness: That's right.

Mr. Friesen: (For Deft.) Does clay vary in quality both laterally and vertically?

The Witness: I don't understand what you mean by "quality."

Mr. Friesen: (For Deft.) Will a clay deposit vary in its constituent elements both laterally and vertically?

The Witness: Depends entirely upon the geological formation.

The Court: What about the same vein?

Mr. Friesen: (For Deft.) I believe the testimony will indicate Dr. Murray said it will definitely vary laterally

and vertically within a few feet of the same point. His testimony was, I believe, it would not vary significantly. I think this is relevant, showing we have like kinds and grades of clay in other deposits.

Mr. Travis: (For Pltf.) Your Honor, I think Mr. Friesen is definitely getting into cross-examination. The reason I know, I know how long it is going to take because I heard it last Saturday. It does not go to the admissibility of this particular exhibit.

The Court: Would you qualify your witness a little more. You used the term "across the road." How far was the second mine?

104 Q. (By Mr. Travis) How far was the entrance of the second mine from the entrance to the first?

A. I would say roughly about 2,000 feet.

The Court: How far had they mined back into the old mine?

105 Q. (By Mr. Travis) Yes. Do you know how far you were back in the old mine?

A. Probably a mile.

106 Q. And, of course, the new mine you just opened up directly at the mine opening and started mining how far back in?

[fol. 38] A. The new mine?

107 Q. Yes.

A. We were probably a mile in the new mine.

108 Q. When you started mining, how far did you have to go?

A. Probably have to go in 4500 feet before we get satisfactory material.

109 Q. And the products which you manufactured from the two mines, were they of like quality and kind?

A. Yes. We used the two clays concurrently, the two materials from the two mines concurrently.

Mr. Travis: (For Pltf.) I think, your Honor, that should be enough to qualify the exhibits.

The Court: The objection will be overruled, and Exhibits 14 and 15 are admitted and read in evidence.

(Plaintiff's Exhibits No. 14 and 15 are admitted and read into the evidence, and made a part of the record in this



case, said exhibits being in the words and figures following, to-wit:)

(Here Insert.)

110 Q. (By Mr. Travis) Will you tell the Court the pyrometric cone equivalent shown on Exhibit 14?

A. The pyrometric cone equivalent for the fire clay was Cone 19 to 20.

111 Q. Except for a test which was made on this clay from this same mine to which Mr. Friesen referred in his opening statements, have you ever had a test made with a P.C.E. showing less than 19 on your fire clay?

A. No.

112 Q. Can you say it has been as high as 26?

A. Yes.

The Court: Has he made other tests?

[Vol. 39] 113 Q. (By Mr. Travis) Have there been tests made through the years?

A. There have been tests made in our own laboratories and by the Geological Survey.

Mr. Travis: (For Plt.) Your Honor, the deposition which will be read later also shows the Indiana Geological Survey made tests of its own independent. They are already attached as exhibits to the deposition.

114 Q. (By Mr. Travis) In 1951 did you use in your production of sewer pipe all of the clay and shale which you mined?

A. Yes.

115 Q. Did you sell any of that clay in other than the finished product?

A. Not to my knowledge.

116 Q. I mean of the ground fire clay.

A. There may have been an infinitesimal amount of ground clay.

117 Q. In the raw form, as the clay comes out of the ground, do you know did you sell?

A. We sold no crude raw clay.

118 Q. Have you up to date?

A. No.

119 Q. Did you buy any clay or shale of any kind in 1951?

A. No.

120 Q. Do you know all of the other producers of clay products in the area of Cannelton, Indiana?

A. Yes.

121 Q. In 1951 do you have any knowledge of any sales of raw clay to or by any such producers of clay products?

A. No.

[fol. 40] 122 Q. Do you know in the immediate Cannelton Area of any mine owner or operator who mined and sold clay to others?

A. No.

123 Q. Is there a market price for clay in Cannelton, Indiana?

A. No.

124 Q. What is the nearest sewer pipe producer in Cannelton?

A. You mean in any state?

125 Q. No; in Indiana.

A. The nearest producer in Indiana is the American Vitrified Products Company, Brazil, Clay County, Indiana.

126 Q. You stated there were four producers of sewer pipe in Indiana in 1951 other than your company. Are the other three located in the Brazil, Indiana, Area?

A. Two are in Brazil, Indiana, and one is in Mecca, Indiana.

127 Q. And that is north of Brazil?

A. North of Brazil.

128 Q. Mecca is in Parke County?

A. Yes.

129 Q. You heard Dr. Murray testify in his deposition that the clay in the mines which you have identified is called the Cannelton clay, have you not?

A. Yes.

130 Q. Is that because it lies under what is called the Cannelton coal?

A. Yes.

131 Q. What is the nearest producer of any vitrified clay product to Cannelton which was using Cannelton clay in 1951?

A. Can you state the question again?

[fol. 41] The Court: Read the question.

(The reporter read the last preceding question as follows: 131Q. "What is the nearest producer of any vitrified clay product to Cannelton which was using Cannelton clay in 1951?")

A. There was no one else using Cannelton clay in 1951.

132 Q. (By Mr. Travis) Is the clay which is now being used by your company and others from Hancock County, Kentucky, a so-called Cannelton clay?

A. No.

Mr. Travis: (For Pltf.) Your Honor, the Plaintiff's Exhibit 1 is a map which is attached to Dr. Murray's deposition, and I will refer to Exhibit 1 although this is not the one that was introduced. (To Mr. Friesen) Could I have one of those to let the Judge look at?

The Court: Gentlemen, suppose we take a few minutes' recess here.

(Whereupon the Court was recessed at 11:10 a.m., and reconvened at 11:35 a.m., at which time the following proceedings were had:)

Mr. Travis: (For Pltf.) Your Honor, the plaintiff would like to interrupt at this time, and have the deposition of Dr. Haydn H. Murray published, so I can get the exhibits out of it.

Mr. Friesen: (For Def.) No objection, your Honor.

(At this time the deposition of Dr. Haydn H. Murray was published.)

133 Q. (By Mr. Travis) I was referring, Mr. Clemens, at the time of recess, to Plaintiff's Exhibit 1 attached to the deposition of Dr. Haydn Murray. Would you tell the Court in general what that is?

[fol. 42] A. This is a map showing the location of the clay and shale pits and the ceramic plants in Indiana.

134 Q. Referring to Perry County, where, in general, is that located?

A. Perry County is located in the extreme south central part of Indiana on the Ohio River.

135 Q. The south boundary is the river?

A. The Ohio River.

136 Q. I notice in Perry County there are shown, according to the explanatory marks, a black triangle which is the Pennsylvanian shale pit and ceramic plant, and a black circle which is a Pennsylvanian clay pit and ceramic plant. Do those two designations refer to the mine which the Cannelton Sewer Pipe Company was using?

A. Yes.

137 Q. Immediately to the north is what is stated as a "Pleistocene-water-laid clay pit and ceramic plant." What plant is that?

A. That is a plant of the United States Brick Company.

138 Q. What material do they use in producing their product?

A. They use a river-bottom silt, or a, as described here, a water-laid clay.

139 Q. Would that clay be suitable for producing sewer pipe in your plant?

A. No.

140 Q. Now, working your way along the river westward, what is the next plant or pit shown on the map?

A. In Spencer County is a brick plant, Rockport Brick and Tile Company, which used the same type of water-laid material for producing brick.

141 Q. Is that what you would call "river silt"?

A. Yes.

[fol. 43] 142 Q. Would that be suitable for producing sewer pipe in your plant?

A. No.

143 Q. Now, getting clear over to Vanderburgh County, what is there over there in the way of clay production?

A. To my knowledge there were two plants in Vanderburgh County, owned by the Standard Brick and Tile Corporation; one used river silt to produce brick; the other used a shale to produce brick and tile.

144 Q. Would either of the materials used by those companies be suitable for the production of sewer pipe in your plant in 1951?

A. No.

145 Q. Now, going northward to DuBois County, would you state what the map shows as to mines or plants in that county?

A. In DuBois County is shown a symbol which says "Ceramic plant," which I presume referred to the Huntingburg Brick Company. There is also a symbol which shows the "Pennsylvanian clay pit" with which I am not too familiar. There is also another symbol which shows a "Pennsylvanian shale pit" with which I am not too familiar.

146 Q. Have you ever tested any of those, the material, in DuBois County?

A. Yes.

147 Q. Have you found any that were suitable for making sewer pipe in your plant?

A. Yes.

148 Q. Now, how far is Huntingburg from Cannelton?

A. About 24 miles.

149 Q. If you had been told in 1951 that you could purchase fire clay at Huntingburg for Three Dollars and a [fol. 44] Quarter a ton, loaded in your trucks, could you have transported that clay to your plant in Cannelton cheaper than you were mining clay in your own mine?

A. No.

150 Q. There will be evidence introduced, I am assuming, Mr. Clemens, that clay possibly suitable for the manufacture of sewer pipe was readily available in Clay County, Indiana, during 1951. Could your company have transported that clay from Brazil, Indiana, at any conceivable price, to your plant in Cannelton and had a cost at your plant less than your cost of mining from your own mine?

A. No.

151 Q. What would you say was the maximum hauling distance of raw clay to your plant for a profitable operation in the manufacturing of sewer pipe?

A. Assuming a reasonable price, a reasonable cost at the mine?

152 Q. Yes.

A. About 10 miles maximum.

153 Q. Is it generally, almost universally true, that plants which produce clay products are located in the very immediate vicinity of a mine with clay suitable for their manufacturing?

A. Yes.

154 Q. Is clay as such a relatively plentiful mineral?



A. I will have to qualify my answer to that by saying that there are many clays and shales, and of many different characteristics, and as such it is a relatively plentiful material, generally speaking, geologically speaking.

155 Q. Isn't it probably the most plentiful mineral on the face of the earth?

A. Clays, shales, and stone.

156 Q. What was the freight rate by railroad from Huntingburg to Cannelton for raw clay?

[fol. 45] A. May I refer to some notes for that?

157 Q. Yes, please do.

A. (Witness referring to notes) Before I came over here, I—You are talking about rail now?

158 Q. Yes.

A. Before I came over here, I checked with the Southern Railway, which is the only railroad coming into the Town of Cannelton, and they gave me a commodity rate on clay from Huntingburg to Cannelton of \$2.82 per ton, plus 3 per cent Federal tax.

159 Q. And do you have the rate from Cannelton to Brazil?

A. I would like to qualify that—All right, I will give you that rate, and then I will have to qualify it by saying sometimes it is a different rate in different directions. Cannelton to Brazil, the rate quoted us, quoted the Cannelton Sewer Pipe Company by the Southern Railway was \$4.45 per ton, plus 3 per cent.

160 Q. Federal tax

A. Federal tax, yes, sir.

161 Q. Does that same rate prevail if you were going the other way, from Brazil to Cannelton?

A. The information given to the Cannelton Sewer Pipe Company by Southern Railway was to the effect that that rate did not apply from Brazil to Cannelton; that it was necessary to use a class rate which was \$8.60 per ton, plus 3 per cent Federal tax.

162 Q. If that clay was laid down at the railroad yard in Cannelton, what would you have to do to get it into your first stage of operation in your plant?

A. We would have to unload the clay and transport it either to clay storage or to the grinding plant for processing.

163 Q. What do you think that would cost you?

A. The mine cost would be \$1.00 per ton.

164 Q. \$1.00.

[fol. 46] A. And that is conservative.

165 Q. Do you know anything about the prices paid for clay in Clay County in 1951, where it was sold?

A. We did not attempt to get any prices from Clay County.

166 Q. You are not familiar with any price that was current there in 1951?

A. No, I am not.

167 Q. What do you think it would cost you to haul clay by your trucks from Huntingburg, delivered into your plant?

A. Before coming here we had our Shipping Department estimate costs; for trucking in rather large trucks from Huntingburg to Cannelton, the amount of \$4.00 per ton.

Mr. Friesen: (For Deft.) Your Honor, I object to the question. We do not have the witness who prepared the figures, and he has not qualified himself as an expert on computing such costs.

The Court: What do you say about that?

Mr. Travis: (For Plff.) Let me qualify that a little.

The Court: Do you agree the answer goes out?

Mr. Travis: (For Plff.) At this time I will.

The Court: All right.

168 Q. (By Mr. Travis) Were the records from which you are about to testify made from the regular business records kept by your company?

A. Yes.

169 Q. And will the costs, about which you are about to testify, be related to—directly to actual cost figures which your company has in its business records?

A. Yes.

Mr. Friesen: (For Deft.) I renew my objection that he is not testifying that he made any computation or examined the records. He is saying he had somebody [fol. 47] else do it. This is not the witness who has prepared the data he wants to testify from. I gather he has

in his hand some notes which he has made subsequent to that time.

The Court: I would sustain the objection. It would be pretty hard for these folks to cross-examine this witness on the basic factors. You can pass it for the time being and bring it up later on.

170 Q. (By Mr. Travis) In the years in which you have been an officer of the Cannelton Sewer Pipe Company, do you of your own knowledge have any knowledge of cost of hauling clay per ton mile?

A. Yes.

The Court: By truck, now?

171 Q. (By Mr. Travis) By truck?

A. Yes.

172 Q. What is that cost which is within your own knowledge?

Mr. Friesen: (For Deft.) As of what date, Mr. Travis?

173 Q. (By Mr. Travis) As of 1951, if you can remember.

A. I can't remember that year. I would prefer to refresh my memory from the figures.

174 Q. Have you taken from your regular business books of record some figures showing the cost of mining clay in 1951?

A. Yes.

175 Q. Would you please refresh yourself with them?

A. (Witness referring to notes).

176 Q. What was the cost per ton of mining clay and shale in your own mine at the mine of the Cannelton Sewer Pipe Company in 1951?

A. The cost was \$2.418 per ton.

[fol. 48] 177 Q. Does that include transportation to your plant from the mine?

A. Yes.

178 Q. So, that was the cost laid down in your plant?

A. Yes, that was the cost dumped into our grinding plant.

179 Q. Were you familiar with the producers of clay products in Hancock County, Kentucky, in 1951?

A. I don't think there were any producers in Hancock County in 1951.

180 Q. Are you familiar with any mining, clay mining, operations in that county in 1951?

A. Yes.

181 Q. Where is Hancock County, Kentucky?

A. Hancock County, Kentucky, is directly—It is in Kentucky, directly across the Ohio River, south of Perry County.

182 Q. Indiana?

A. Indiana.

The Court: Right across the river from your mine that you had in '51?

The Witness: Yes, sir.

The Court: The river is about a mile across there?

The Witness: About three quarters of a mile.

183 Q. (By Mr. Travis) What transportation is there across the river from Indiana to Kentucky?

A. Ferry.

184 Q. What is the town or city immediately opposite?

A. Hawesville.

185 Q. It has been testified, Mr. Clemens, in the deposition of, L. R. Chapman of Lewisport, Kentucky, which will be introduced later in this proceeding, that in 1951 the only company in Kentucky for whom he was mining and hauling clay was the Owensboro Sewer [Vol. 49] Pipe Company. Did you hear that deposition, that testimony?

A. Yes, sir.

186 Q. What other producers of clay products were getting their clay from Hancock County, Kentucky, in 1951?

A. To my knowledge none.

The Court: How far is Owensboro from this Hancock County? What is the distance from Owensboro to Hancock County?

The Witness: From Hawesville, the county seat, to Owensboro is approximately 30 miles by highway.

187 Q. (By Mr. Travis) Now, isn't there a company in that vicinity called Murray Brick and Tile Company?

A. Murray Tile Company is the correct designation; at Cloverport, Breckinridge County, Kentucky.

188 Q. Where did they mine any clay in 1951?

A. To my knowledge it was mined on their own property.

189 Q. Was that near or adjacent to their plant?

A. Immediately adjacent to the plant.

190 Q. Now, is there an Owensboro Brick Company?

A. Yes.

191 Q. Where are they located?

A. They are located in Owensboro, Kentucky.

192 Q. In 1951 do you have any knowledge where they were obtaining their clay supply?

A. To the best of my knowledge it was obtained from their own pit directly adjacent to the plant.

193 Q. And is there a Rockport Brick Company?

A. Yes.

194 Q. Where is that?

A. It is located at Rockport, Spencer County, Indiana.

195 Q. And where were they getting their clay, if you know, during 1951?

A. To the best of my knowledge they were taking it from a pit, an open pit immediately adjacent to their plant.

196 Q. And where is the Boonville Brick Company?

A. The Boonville Brick Company is at Boonville, Indiana. I do not know the name of the county. —It's Warrick County.

197 Q. Do you know where they were obtaining their supply of clay in 1951?

A. I am not too familiar with that plant, but to the best of my knowledge they were obtaining it the last time I was on the plant, at that time they were obtaining it from a pit near their plant.

198 Q. You have been in all of these plants you have testified about?

A. Yes.

199 Q. And have you been in their clay pits or seen them?

A. Yes.

200 Q. Are any of those companies, which you have mentioned other than the Owensboro Sewer Pipe Company, were they in 1951 producing any products similar to vitrified sewer pipe which you manufactured?

A. No.



201 Q. Would any of those companies require the same quality and characteristics in the clay which they use as that used by the Cannelton Sewer Pipe Company?

A. The qualities for their products are different, the manufacturing qualities are different than for clay sewer pipe.

202 Q. Have you ever been shown any tests of the materials used by any of those companies, or any other [fol. 51] companies in the vicinity of Cannelton, Indiana, as to the P.C.E. and chemical qualities of those clays?

A. Only the Owensboro Sewer Pipe Company.

203 Q. I will hand you what has been identified as Plaintiff's Exhibits 11 and 12, although they are identified in Dr. Haydn Murray's deposition. Will you tell the Court what they are, please?

A. These are fired test samples of fire clay which was taken from the mine of the Cannelton Sewer Pipe Company by Dr. Haydn Murray, formerly with the Indiana Geological Survey.

(The plaintiff, for purposes of identification, handed the reporter certain objects for marking, and which were by said reporter marked Plaintiff's Exhibit No. 16 and No. 17.)

204 Q. (By Mr. Travis) I hand you now what has been identified as Plaintiff's Exhibits 16 and 17, and ask you what those are.

A. These are fired test samples of shale taken from the mine of the Cannelton Sewer Pipe Company by Dr. Haydn Murray, formerly with the Indiana Geological Survey.

205 Q. And those are the same tests as are referred to in Dr. Murray's deposition as "shale"?

A. Yes.

206 Q. I call your attention to the difference in color of the samples. Is that a characteristic of shale and clay?

A. Usually a shale contains some iron which when fired causes it to have a darker color, darker color than fire clay.

207 Q. Referring again to the mine from which your company is now receiving its supply of clay and [fol. 52] shale in Kentucky, was that mine accessible to you in 1951?

A. No.

208 Q. Why not?

A. Well, I will have to qualify that. It was accessible, but not by a direct route.

209 Q. How far would that mine have been from your plant in 1951 by then existing highways suitable for truck transportation?

A. Slightly over 17 miles.

210 Q. How far is it now?

A. Approximately seven miles.

211 Q. And what had to be done to make that accessible at a distance of seven miles?

A. A new State and County Road was built through the area where we are now receiving clay.

212 Q. Was that road built at the special instigation of L. R. Chapman so the mine would be accessible?

A. A portion of the road was built for that purpose, yes.

213 Q. Prior to the building of that road, would it have been economically feasible for your company to obtain clay or shale suitable for the production of vitrified sewer pipe from the mine which you are now obtaining it?

A. No; the trucking costs would have been too high.

214 Q. Was—What does it cost to take a truck across that ferry?

A. Those figures I am not exactly sure of. It is—We have a rate with them.

215 Q. What is the rate?

A. I am not sure. I would have to look at the exact figures. I should have brought those along. I have them in my regular cost figures, but I hesitate to say offhand.

[fol. 53] The Court: How much longer would you be with the witness on direct examination?

Mr. Travis: (For Plff.) That's all, your Honor.

The Court: I think we have reached a good point for recess for lunch. We will recess until two o'clock.

(Whereupon the Court was recessed at 12:10 o'clock p.m., to reconvene at 2:00 o'clock p.m. this date.)

Indianapolis, Indiana, March 11, 1958. 2:07 o'clock p.m.

(The Court met pursuant to adjournment, and the trial was resumed as follows:)

Mr. Travis: (For Plff.) I have two questions, your Honor.

~~Ex~~ENE C. CLEMENS, a witness called by the plaintiff, resumed the stand and testified further as follows:

Direct examination continuing.

Questions By Mr. Travis:

216 Q. Mr. Clemens, do you wish to correct the statement you made this morning regarding the distance, truck route distance, from Huntingburg to Cannelton?

A. Yes.

217 Q. And have you informed yourself during the noon hour of the exact mileage?

A. Yes.

218 Q. What is it?

A. The statement which I made this morning was based on the distance that I travel on country roads when I go to Huntingburg. The most direct route over which trucks [fol. 54] can travel from Cannelton to Huntingburg is 42 miles, which is the distance I took off the Indiana Highway Map.

219 Q. That is the map published by the Highway Commission?

A. Indiana Highway Commission.

220 Q. What is the distance, most direct truck route distance, from Brazil to Cannelton?

A. 140 miles.

Mr. Travis: (For Pltf.): Thank you. That's all.

The Court: Cross-examine.

Cross-examination.

Questions By Mr. Friesen:

221 Q. Mr. Clemens, you have spent a great deal of time explaining what the ordinary treatment processes were of the sewer pipe manufacturers. Are these the same ordinary treatment processes as are used by all clay pipe manufacturers and operators?

A. They are essentially the same processes used by manufacturers.

222 Q. Of sewer pipe manufacturers?

A. Yes.

223 Q. Aren't there a lot of clay mine owners and operators that don't manufacture sewer pipe?

A. Clay miners.

224 Q. Mine owners and operators who do not manufacture sewer pipe.

A. There are some.

225 Q. Do you have any idea what percentage of the total clay consumed is used in making sewer pipe, as opposed to brick and tile, or structural tile, or many of the other products that are made out of clay?

A. I couldn't speak with authority on that.

226 Q. Do you use the same treatment processes as the Huntingburg Brick Company?

[fol. 55] A. Partially.

227 Q. At what point don't you use any of the treatment processes any further?

A. The grinding process is different, the drying process is different, the firing and heat-treating process is different.

228 Q. So, up to the point where you begin grinding the material, your processes are the same, is that correct?

A. Crushing, it has to be crushed if it is delivered in lump form.

229 Q. And this would be true of any other manufacturer of ceramic products who didn't make sewer pipe, wouldn't it?

A. I can't say that that would be true, because there are many manufacturers of materials other than sewer pipe who get their clay in different forms, but whom I would not be entirely conversant.

230 Q. But the ordinary treatment processes of all mine owners and operators would include essentially the same mining and transporting operation to the grinding mill, isn't that correct?

A. You are referring to structural clay products, sewer pipe, or what?

231 Q. Any clay products. They all have to get the clay out of the ground and transport it to the place where they grind it?

A. Yes.

232 Q. But beyond that, the processes begin to differ, isn't that correct?

A. Yes.

233. Q. What is the market area for the products which you produce?

A. The finished product?

234 Q. Yes, Mr. Clemens.

[fol. 56] A. Indiana; Illinois; Kentucky; Tennessee, a portion of Tennessee; a portion of Missouri; a small portion of Arkansas. That is it.

235 Q. Any Ohio sales? Cincinnati, for instance?

A. No.

236 Q. Do you ever ship goods as far as Chicago?

A. Yes.

237. Q. Are there any vitrified sewer pipe manufacturers between Cannelton and Chicago?

A. Yes.

238 Q. What are those?

A. American Vitrified Products Company, Nateco Corporation, and Clay City Pipe Company.

239 Q. And they all produce a product similar to yours?

A. A product that meets the same specifications for performance.

240 Q. Would--You would call them competitive with you, wouldn't you?

A. Yes.

241 Q. Now, how much does the cost of transporting clay differ from the cost of transporting finished sewer pipe?

A. We don't transport clay that distance, our company does not; so I could not compare the cost of transporting clay any great distance.

242 Q. What is the ton-mile cost of transporting your product to--over any distance?

A. I would have to refer to the company records for that.

243 Q. Now, when you testified this morning, when you knew the ton-mile cost of transporting clay over a relatively long distance, were you testifying with reference to the cost of transporting the finished product over those distances? [fol. 57] Mr. Travis: (For Pltf.) Just a minute. To which the plaintiff objects. I believe I am correct in remembering that the testimony as to ton-mile cost of transportation, other than railway, was excluded on your objection.

Mr. Friesen: (For Deft.) I am trying to find out the source of his information.

Mr. Travis: (For Pltf.) Your question stated he testified



to the ton-mile cost, and I believe your objection was sustained to my question asking him that.

Mr. Friesen: (For Deft.) I am asking what the source of the figure was.

The Court: I have forgotten what the question is. Let's read the question.

(The reporter read the last preceding question as follows:

243 Q. "Now, when you testified this morning, when you knew the ton-mile cost of transporting clay over a relatively long distance, were you testifying with reference to the cost of transporting the finished product over those distances?")

The Court: As I recall, there was an attempt made to get that evidence in this morning which was unsuccessful; first objected to, and, then, they sought to qualify their witness by personal knowledge rather than the records built up by some employee of the witness.

Mr. Friesen: (For Deft.) Your Honor, I was trying to find out myself whether this witness knows what I am trying to find out.

The Court: When he got into his personal knowledge of it, his memory failed him then.

Mr. Friesen: (For Deft.) All right, I withdraw the question, then.

The Court: All right.

[fol. 58] 244 Q. (By Mr. Friesen) Mr. Clemens, do you know whether it is more difficult to transport your finished product than it is to transport raw clay?

A. I would say it was.

245 Q. Do you know whether it is more costly or less costly, speaking only in relative terms, to transport the finished product than the unfinished product, the raw clay?

A. That depends entirely upon who transports it.

246 Q. And when you testified that the manufacturers of brick require different qualities in the clay than you require for making sewer pipe, what are the different qualities that are required?

A. The clay required for making sewer pipe has to have a higher tensile strength than—a higher fired tensile strength than that required for making brick.

247 Q. Is there anything about the higher fired tensile strength that would prevent the material being used for making brick?

A. No.

248 Q. Then there is nothing about the quality of the material used in making sewer pipe that would prevent its being used for making brick, is there?

A. That depends upon what type of brick you want to make.

249 Q. What types of brick can not be made from sewer-pipe quality clay?

Mr. Travis: (For Pltf.) Your Honor, the plaintiff objects to the question for the reason that I, at least, can not see the materiality of this comparison between brick and sewer pipe, where we are concerned here solely with the production of sewer pipe by this plaintiff.

Mr. Friesen: (For Deft.) The plaintiff opened the inquiry by asking if there were different qualities involved. I am trying to find out whether the clay that is used at [fol. 59] Cannelton is not perfectly suitable at Boonville, or used by Murray Tile Company, all the companies he mentioned were making brick.

The Court: I am trying to get to the materiality. I picked you up on that. But the object of that testimony was to show what actual type of clay was used, and the testimony there was it was water silt.

Mr. Friesen: (For Deft.) Your Honor, I don't believe that is true as to Boonville.

The Court: That was his testimony, as I recall.—No; it was a shale.

Mr. Travis: (For Pltf.) All of them, he testified he had had no samples of the clay in 1951; and unless Mr. Friesen can supply him with analyses, I don't see how he can compare anything. Also, if he wants to ask about Boonville, why doesn't he ask about it, the specific question, rather than generalizing about the clay used for brick and sewer pipe?

The Court: If I can interrupt, that Boonville one was shale and shale only, and was not clay. Is that your memory of it?

Mr. Friesen: (For Deft.) I don't recall. Boonville has not always used shale.

The Court: That was his testimony from the map, and that is what you are cross-examining on. Exhibit 1 shows shale.

Mr. Friesen: (For Deft.) Of course, these taxpayers have a shale also, which is involved in this case. If we go further than that into these many producers who are in the area, for instance, Huntingburg Brick Company, it seems to me the witness was trying to imply there was a difference in the clay by virtue that the quality was not necessarily the same, and I am simply trying to extract from the witness an admission there is nothing about the clay in Huntingburg, or the underclays mined anywhere in Southern [fol. 60] Indiana, that are substantially different from the clays we have here.

The Court: What about shale differing from the clay? You asked him a question here. I think that was the question about Boonville. He hadn't testify it was a clay; he testified it was a shale.

Mr. Friesen: (For Deft.) Perhaps I picked the wrong one.

The Court: Let's read the question to be sure where we are. I understand shale is a clay but it is a different quality than the other type of non-shale clay.

Mr. Travis: (For Pltf.) I would like to point out, too, I think we should all keep it in mind that shale in this proceedings, there is no question about its depletion rate; that is fixed by statute. Therefore, Mr. Friesen questioning as to shale would not be pertinent because the marketability of shale is the only issue he has preserved. He certainly won't contest shale is entitled to a per cent depletion rate.

Mr. Friesen: (For Deft.) I certainly do not contest that, Mr. Travis.

The Court: Let's read the question.

(The reporter read the last preceding question as follows: 249 Q "What types of brick can not be made from sewer-pipe quality clay?")

The Court: What do you say about that, now?

Mr. Friesen: (For Deft.) I am asking that question to find if his original statement, regarding the differences in quality, refers to anything within the area of this suit.

Mr. Travis: (For Pltf.) I want to call the Court's attention to the fact that the question is absolutely in reverse.

of the witness's testimony, as I recall it, this morning. He said that all clays will not make sewer pipe. Mr. Friesen's [fol. 61] question is what clays that will make sewer pipe won't make brick.

The Court: I will overrule the objection, and let's see where he is going from here. You may answer.

A. The use of any clay or shale by a manufacturer depends on his ability to make use of it, and I can not unreservedly say that you can make brick out of any sewer pipe clay.

250 Q. (By Mr. Friesen) But do you know of a sewer pipe clay that can't be used for making brick?

A. I would say that the shale that is being used at Cannelton would be difficult, very difficult material to manufacture into brick, and shale that was being used in 1951.

251 Q. How about the clay that was being used in 1951?

A. That could be processed into brick.

252 Q. Do you know if it would make a high buff brick?

A. Yes.

253 Q. Turning to the transportation costs which you have discussed, was it your testimony that it would cost a Dollar a ton to haul the clay from the mine at Cannelton in 1951 to the plant?

A. No.

254 Q. What was your testimony as to that cost?

A. The only Dollar a ton that I can remember using this morning was the cost for unloading from railroad cars into trucks and transporting to a grinder or storage.

255 Q. How far is that from the railroad siding into your grinding and storage?

A. That would not be more than two blocks.

256 Q. How—Do you know how much it costs per ton to deliver clay from your mine to the bin?

[fol. 62] Mr. Travis: (For Pltf.) Now, if your Honor please, the plaintiff renews its objection. This is exactly the line of testimony that was excluded this morning.

Mr. Friesen: (For Deft.) I didn't ask what it was; I asked him if he knew, Mr. Travis.

Mr. Travis: (For Pltf.) May I, please? This was the exact line of questioning that was excluded from his testimony this morning on Mr. Friesen's objection. The witness

finally stated that he had no personal knowledge other than memory except for consulting the books.

The Court: Well, I don't know that this is quite true. You finally got this answer from your witness: that the cost of mining clay, per ton, in '51, including the transportation, to and from the plant and back to the mine, was \$2.418.

Mr. Travis: (For Pltff.) Yes, sir, I did.

The Court: Is that right.

Mr. Travis: (For Pltff.) Yes.

The Court: I will overrule the objection.

257 Q. (By Mr. Eriesen) Do you know the cost of hauling clay from the mine to the plant in 1951?

A. I would have to consult the company records for the exact cost.

258 Q. Where did you get the figure \$2.41 per ton?

A. I got those from the company records.

259 Q. And do you recall making a computation by dividing thirty-eight thousand-some odd tons of clay into a figure of \$91,374.15?

The Court: Excuse me. Was that some testimony? I don't recall the testimony. Is that some conversation on the side?

Mr. Eriesen: (For Deft.) No. I am asking if that is the way he got the figure.

Mr. Travis: (For Pltff.) By doing what?

The Court: Read the question.

[fol. 63] Mr. Eriesen: (For Deft.) By dividing the 38,000 into \$91,374.15.

A. I divided 38,474 tons into \$93,048.42.

(The defendant, for purposes of identification, handed the reporter a certain document for marking, and which was by said reporter marked Government Exhibit B.)

260 Q. (By Mr. Eriesen) Mr. Clemens, I hand you what has been marked for identification as Government's Exhibit B and ask you if you ever have seen that document before.

A. I don't recall seeing this particular one.

261 Q. What does this document appear to be?

Mr. Travis: (For Pltff.) May I see it, please? (Mr. Travis tendered document).



A. That is a profit and loss statement.

262 Q. (By Mr. Friesen) From what company?

A. I never got past reading the first line until Mr. Travis took it. (Witness tendered document.)

I saw the profit and loss statement for the company, but...

The Court: (Interposing) Is that the plaintiff?

The Witness: Yes.

The Court: All right.

A. (Cont'g) I saw the profit and loss statement for that year, yes, but I am not sure this is the same document I saw.

263 Q. (By Mr. Friesen) If I told you this came from the files of the Internal Revenue Service with relation to the Cannelton Sewer Pipe Company for 1951, would you recall having delivered that to the Internal Revenue Service?

A. I had nothing to do with the delivery.

[fol. 64] Do you know who prepares the profit and loss statements for your company?

A. Yes.

265 Q. Who is that?

A. Edward Clemens. He is in direct charge of it.

Mr. Friesen: (For Deft.) Mr. Clemens has looked at this document. Will counsel stipulate this is one of those prepared by Mr. Clemens?

Mr. Travis: (For Pltf.) Where did you get it?

Mr. Friesen: (For Deft.) From the files of the Internal Revenue Service.

Mr. Travis: (For Pltf.) I can't understand the form of this, why would it be submitted in this form. Any explanation in the file?

Mr. Friesen: (For Deft.) No explanation.

Mr. Travis: (For Pltf.) Why is it marked "Exhibit E"?

Mr. Friesen: (For Deft.) I don't know what that is.

Mr. Travis: (For Pltf.) Does that compare with our income tax return?

Mr. Friesen: (For Deft.) A great number of the figures do; not all of them.

Mr. Travis: (For Pltf.) Isn't there a letter of transmittal showing where it came from?

Mr. Friesen: (For Deft.) I don't find it. It was attached to the work papers.

Mr. Travis: (For Pltf.) I want to explain to your Honor the reason I want to be a little fussy about stipulating it is because the accountant for the plaintiff, at the request of the Internal Revenue Service in Indianapolis, made a great many computations for the convenience of the Revenue Service to which the plaintiff has not in any sense agreed, but were made on theories which the Revenue Service told [fol. 65] our accountants to use in analyzing the operating results for that year. Whether we are getting into something that could possibly be figures to which we don't agree, I don't know.

Mr. Friesen: (For Deft.) Your Honor, this is a copy of the same document. I am interested in these figures on mining expense, which are shown.

The Court: Why don't you call on counsel to stipulate what the mining expense was on the two figures? Otherwise, we would have to recess to let counsel check your instrument against their profit and loss.

Mr. Friesen: (For Deft.) His figure was only \$2,000 higher. I am interested more in a breakdown than the total figure. \$2,000 difference in mining expense does not make a substantial difference.

Mr. Travis: (For Pltf.) For many years after this case arose in the Revenue Service, the Revenue Service was contesting taking depletion on the end product. Therefore, our accountants for the convenience of the Government, made mining costs which are now unrealistic in view of the Supreme Court decision; so, I certainly don't want to get in a point where we are stipulating anything that is unrealistic. Mr. Clemens has in his hand the statement of mining costs from which he testified (statement tendered to Mr. Friesen), and I would prefer . . .

The Court: (Interposing) Let the record show counsel for plaintiff has tendered to the Government counsel what

What, now, sir, in lieu of the stipulation of the proposed Exhibit B?

Mr. Travis: (For Pltf.) What are the two sheets which I just handed to Mr. Friesen?

Mr. Friesen: (For Deft.) Which we shall ask to be marked Government's Exhibit C for identification.

The Court: All right, you may answer.

[fol. 66]. The Witness: The one sheet covers a breakdown of clay costs for the fiscal year ending November 30, 1951, for the Cannelton Sewer Pipe Company.

The Court: Would you tender it to the reporter now and have her mark it?

(The defendant, for purposes of identification, handed the reporter a certain document, consisting of two pages, for marking, and which was by said reporter marked Government's Exhibit C.)

Mr. Friesen: (For Deft.) I apologize for the delay. I did not understand this was not a valid copy.

Mr. Travis: (For Plt.) Was the offer of Exhibit B withdrawn?

Mr. Friesen: (For Deft.) I never offered it.

266 Q. (By Mr. Friesen) This "Motor Truck Hauling Expense," \$5,017.75, is that the total cost of hauling the thirty-eight thousand odd tons during the year 1951?

A. That is the motor truck expenses cost only.

267 Q. Now, have you any item on that list for overhead which is attributable to the mining operation?

A. I don't see it on here.

268 Q. Do you have any figure on that list for the amount of taxes on the property laid to the mine?

A. I don't see it on here.

269 Q. Is there any figure on that list showing the amount of investment in mining properties, or depreciation on mining properties?

A. Yes.

270 Q. Is that the total equipment that you had involved in the mine during that year, total depreciation on equipment that you had involved?

A. Inside the mine.

271 Q. Does not include any of the trucks' depreciation? [fol. 67] A. No.

272 Q. Would the hauling cost for the trucks include any depreciation on the trucks?

A. I am not sure of that; I think it does. I would have to check the depreciation figures on the company records.

273 Q. There is no overhead or tax attributed to this particular operation, is that correct?

A. No property tax.

274 Q. Are there any taxes?

A. Payroll taxes.

275 Q. And how much are they?

A. \$1711.35.

276 Q. Do you think that in computing the cost of obtaining materials that you should include in those costs the property taxes and the other items that I have included?

Mr. Travis: (For Plff.) If your Honor please, the plaintiff will object to this line of questioning. This witness has already testified that he is not in the financial end of this business; that his brother, Edward, who is present in the court room and will be on the stand, handles all of the financial dealings, and I think we are going to waste a lot of time if you would reserve until Mr. Edward Clemens testifies anything you want about the finances of the company.

The Court: Overruled. You may answer.

A. Will you repeat the question, please?

The Court: Read the question.

(The reporter read the last preceding question as follows: 276 Q. "Do you think that in computing the cost of obtaining materials that you should include in those costs the property taxes and the other items that I have included?")

[fol. 68] A. My answer to that would be that this is our present accounting system.

277 Q. (BY Mr. Friesen) So, it is just an accounting system; does not really reflect the cost of producing play out of the mine?

A. It reflects the costs stated in this exhibit.

Q. And nothing more.

Mr. Friesen: (For Deft.) I now offer the Government's Exhibit C.

The Court: Consisting of two pages.

(Government's Exhibit C was offered in evidence at this time by Mr. Friesen.)

The Court: Any objection?

Mr. Travis: (For Plff.) No objection. I think as long as it is being introduced in evidence, the Court should be told what the second sheet is.

279 Q. (By Mr. Friesen) You have only identified Sheet 1, which was the breakdown on clay costs of manufacture. What is Sheet 2, of Government's Exhibit C?

A. Sheet 2 is the average cost per ton for clay for the years 1952 through 1955, inclusive.

280 Q. Were they similarly computed the way this was computed?

A. Yes.

The Court: By "this" you mean Sheet 1?

Mr. Friesen: (For Deft.) Yes. I beg your pardon.

The Court: You are offering . . .

Mr. Friesen: (Interposing for Deft.) Government's Exhibit C into evidence.

The Court: Consisting of two sheets.

(Government's Exhibit C was re-offered in evidence at this time by Mr. Friesen.)

[fol. 69] The Court: Any objection?

Mr. Travis: (For Pltf.) No objection.

The Court: There being no objection, C is admitted, read, and exhibited in evidence.

(Government's Exhibit C is admitted and read into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following, to-wit:)

(Here Insert.)

281 Q. (By Mr. Friesen) Mr. Clemens, do you know how much of an investment you had in the mine which you owned in 1951?

A. I don't, no, know the exact figure, no.

282 Q. Would Mr. Edward Clemens know that, you think?

A. You will have to ask him.

Mr. Travis: (For Pltf.) If you will be specific as to what you mean by "investment," Mr. Edward Clemens will produce any figure you want by telephone.

283 Q. (By Mr. Friesen) You testified that the reason that you started obtaining your clay from Kentucky was not because you were running out of clay. What was your reason?



A. The primary reason was so that we could produce a better product at a cheaper cost.

284 Q. You imply, Mr. Clemens, it was less expensive to get the clay from Kentucky.

A. I am not implying that necessarily, because you will note that there are some rather low costs, net clay costs on Exhibit C were given; but the clay which we obtained from Kentucky we can process by simpler methods.

285 Q. You were at the deposition of L. R. Chapman and heard him testify that for \$10.00 an acre, sales price of the [fol. 70] land, a Dollar per ton, sales price for the clay, and 40 cents per ton, transportation costs to Owensboro, Kentucky, that he was able to furnish clay to the Owensboro Sewer Pipe Company in 1951. Would you in 1951, if you could have purchased clay for \$1.40 a ton delivered in Cannelton, have been interested in buying it?

Mr. Travis: (For Pltff.) Just a minute. The plaintiff objects to the question, because the question is based upon a false premise, which I challenge Mr. Friesen with well knowing the witness did not testify that he sold clay at \$1.00 a ton in his deposition, and he was very careful to avoid the tricky question which you tried to ask him then to get sales into the picture, and I will let the deposition speak for itself for the Court to see for itself.

Mr. Friesen: (For Deft.) If I used the term "sold" it was unintentional. I meant to say he mined and delivered in Owensboro, Kentucky, at the cost I described: \$10.00 per acre for the land, and \$1.40 for mining and delivery of the clay into Owensboro from the mine some 30 miles away.

286 Q. (By Mr. Friesen) Would you have been interested in purchasing clay for \$1.40 a ton in 1951?

The Court: Just a minute. Do you have an objection?

Mr. Travis: (For Pltff.) I was going to, but I will let him answer.

A. In 1951 we were operating successfully with the clay which we were then using.

287 Q. And I put before you a proposition that you could have purchased the clay at a Dollar less per ton in 1951 and ask you if you were interested, or, would have been interested in purchasing sufficiently good clay in 1951 to have saved a Dollar a ton.

[fol. 71] A. I can't say at this date what I would have done in 1951, because, as I say, we were then operating successfully with the clay we had. We were not approached with any such proposition; so, therefore, I can't say what I would have done that many years back.

288 Q. There are a lot of economies involved in your testimony about transportation and purchases of clay. Now, without any tax advantage considered, wouldn't you be better off to buy your clay at \$1.40 a ton than to mine it at \$2.40 a ton?

A. You are putting a question to me that I would have some difficulty in answering on the spur of the moment. I don't like to answer questions of economies without having some figures behind it.

The Court: He is assuming the fact, Mr. Witness, for you, which you have a right to assume it is true. You don't have to look back. He is assuming for you, based upon evidence back in the record. Is that right?

Mr. Travis: (For Plt.) I didn't hear the question.

The Court: Read the question.

(The reporter read the last preceding question as follows: 288 Q. "There are of a lot of economies involved in your testimony about transportation and purchases of clay. Now, without any tax advantage considered, wouldn't you be better off to buy your clay at \$1.40 a ton than to mine it at \$2.40 a ton?")

The Court: You can assume it is true. The oddity of the \$1.40 figure you don't have any right to question that.

A. You are asking a question about the Year 1951, at which time the depletion law was in effect, is that correct?

289 Q. (By Mr. Friesen) I asked you to assume there would be no tax advantage to mining your own clay, as [fol. 72] opposed to buying your clay, and to use that as an assumption as you used my other statement as an assumption.

A. You are always better off to mine your own clay than to purchase, because you have the advantage of quality controlled by doing your own mining; therefore, I would assume that it would be better for us to mine our own clay than to purchase from a manufacturer or a producer over whom we have no control.

290 Q. Even if it would save you a Dollar a ton to do it that way, to purchase it?

A. That is a question that is difficult for me to answer without being right at the time knowing exactly what we would be purchasing. There are cases where somebody could go scoop clay out of the field and sell it to us for \$1.40 a ton and say it had equal qualities to that we were using out of our own mine at \$2.40 a ton.

291 Q. But if you were purchasing material . . .

The Court: (Interposing) He hadn't finished the answer.

A. (Cont'g) Therefore . . .

292 Q. (Interposing) Excuse me.

A. (Cont'g) Therefore, I have to know all of the facts in the case before I could—It would be a very qualified statement to say that we would be interested in saving the money, just for the sake of saving the money, rather than losing control over our manufacturing process.

293 Q. Mr. Clemens, if I added the assumption that you could direct the miner to deliver to you certain bodies of coal, or, of clay, wouldn't your answer be that you would rather buy it at \$1.40 a ton than \$2.40 a ton produced?

A. I think you are trying to commit me to the purchase rather than mining, and as I say, that is a difficult question [fol. 73] to answer from just on the spur of the moment.

294 Q. Just assuming you get the same quality clay at \$1.40 a ton. You could tell the miner—like you do now—“You dig that section right there and deliver it to me.” Wouldn't you just as soon get it for \$1.40 a ton delivered as to pay \$2.40 a ton to mine it yourself?

A. I would just as soon mine it myself, I believe.

295 Q. And pay a Dollar extra a ton?

A. No. If the other fellow could mine it at \$1.40 a ton, I would try to find some way to mine it for \$1.40 a ton myself.

296 Q. All right. Is there any substantial difference between the quality of the product produced by the Owensboro Sewer Pipe Company and yours?

A. Are you asking me to read into the record an indictment of our competitor?

297 Q. No; I am asking you basically if you don't compete.

A. We compete in the same market, yes, sir.

298 Q. And he sometimes sells in that market that you are competing with him in, is that correct?

A. Yes.

299 Q. Do you know how far from your present mining operation Owensboro takes their clay and shale?

A. Roughly a mile or two.

300 Q. And is that in the same general clay deposit or vein that you are mining from?

A. The same geologic formation.

301 Q. Is that considered to be the Pennsylvanian?

A. Yes.

302 Q. I believe, Mr. Clemens, you testified that you had never had a fire clay test under Cone 19; is that correct?

A. I did not, sir.

[fol. 74] 303 Q. You made some statement concerning the lowest test you had on your fire clay. What was that statement? Do you recall?

A. The lowest test I have ever run has been Cone 19 on fire clay.

304 Q. When you say you have ever run are you including Bruce Williams Laboratories, that furnished this other example which you have introduced into evidence?

A. We have had them run samples for us; one fire clay and one shale.

(The Government for purposes of identification handed the reporter a certain document for marking, and which was by said reporter marked Government's Exhibit D.)

305 Q. (By Mr. Friesen) The reporter has marked for identification the Government's Exhibit D, a copy of a letter furnished the Internal Revenue Service, with a letter directed to the Internal Revenue Service, Mr. G. W. Snyder, Associate Chief. I ask you if you have ever seen that, or the original of that, document before.

A. I saw the original of it, yes.

306 Q. And you have testified that your fire clay has never had a Cone of less than 19. What does the Cone appear to be on that document?

A. Says on this document that the P.C.E. is Cone 17.

307 Q. Do you wish to change your testimony?

A. This was a test which was made and cone tested with the Bruce Williams Laboratories. Inasmuch as it was a

composite of fire clay and shale, we asked them to re-run it.

308 Q. Doesn't it state on the top of that it is fire clay?

A. Yes. And I did not take this sample. It was taken [fol. 75] by someone else at the plant, furnished to them, and we contested it, because it was a composite.

309 Q. How do you know it was shale in that test?

A. Because we later had a sample re-run.

310 Q. Of exactly the same material?

A. No; of the fire clay and shale from the mine.

311 Q. Now, there is a variation both laterally and vertically, I think as we discussed before.

A. Yes.

312 Q. Couldn't it be that the fire clay would have a Cone of 17 in spots and a Cone of 19 or 20 in other spots?

A. If the fire clay was contaminated with impurities, it could have.

313 Q. How can you tell whether this particular material is shale rather than fire clay?

A. I didn't say it was shale. I said it was apparently a composite or a mixture of the two and improperly sampled.

314 Q. Apparently—why do you say apparently?

A. Because when we later ran tests on the same material, or on the fire clay and shale taken at the same mining area, we got a P.C.E. of Cone 19 or 20.

315 Q. By running a test; not the same material, not the same sample?

A. No, sir.

316 Q. So this could be a perfectly good sample of fire clay, what you call fire clay, from the same face, but just had a different pyrometric cone.

A. I say if it was contaminated with impurities, it could have a lower P.C.E.

317 Q. I ask you how you know it was contaminated with impurities.

A. Because that is usually what happens when we get a low P.C.E. There are iron compounds in a clay which contaminate the clay.

[fol. 76] 318 Q. In order to get a high P.C.E. you would have to pick out a sample that didn't have any iron?

A. We have to take an average cross-section over the entire vein, as Dr. Murray told you in his testimony he did.



319 Q. How much iron shows up in that chemical analysis?

A. The iron oxide is 3.19 per cent.

320 Q. The example you gave us with the higher one was 4.10. Would that indicate more or less iron?

Mr. Friesen: (For Deft.) May the record show he is looking at Plaintiff's Exhibit 15.

A. It has a higher per cent of iron oxide, but not significantly higher, and a comparison would also have to be made of all of the other impurities, the other oxides, which influence the maturing temperature and P.C.E. of the clay; for instance, in the one test it shows calcium oxide . . .

The Court: (Interposing) What test is that? Exhibit what?

The Witness: Exhibit D.

A. (Cont'g) Calcium oxide is shown 0.74, while in Exhibit 15 it is shown only as 0.19; so, there are other influencing factors on the P.C.E. of a clay.

321 Q. (By Mr. Friesen) But you can not testify of your own knowledge that this one which you furnished the Revenue Service, in connection with your claim for depletion allowance, was not a sample of what you call fire clay?

A. I did not take the sample, so I can't be sure of what it was.

Mr. Friesen: (For Deft.) May the record show this was furnished the Internal Revenue Service in connection with the percentage depletion computation.

[fol. 77] The Court: What do you mean by "this"? You are speaking of record.

Mr. Friesen: (For Deft.) I beg your pardon. The Government's Exhibit D.

Mr. Travis: (For Pltff.) Let the record show it is offered and admitted in evidence without objection.

Mr. Friesen: (For Deft.) I need to offer the letter, and take it out of the records, and so forth, to show this was attached to the letter sent to the Revenue Service.

Mr. Travis: (For Pltff.) The plaintiff stipulates that Government's Exhibit D was furnished to the Government's Internal Revenue Service by the plaintiff.

The Court: You are offering D?

Mr. Friesen: (For Deft.) I offer D in evidence.

(Government's Exhibit D was offered in evidence at this time by Mr. Friesen.)

Mr. Travis: (For Pltf.) No objection.

The Court: There being no objection, D is admitted, read and exhibited in evidence.

(Government's Exhibit D is admitted and read into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following, to-wit:)

(Here Insert.)

322 Q. (By Mr. Friesen) Mr. Clemens, you are a ceramics engineer, are you not?

A. Supposed to be, yes.

323 Q. And as a ceramics engineer are you familiar with refractories?

A. Yes.

324 Q. What is a refractory?

A. That covers quite a varied field. There are hundreds of different refractories. Specifically which one do you want me to describe?

[fol. 78] 325 Q. I was asking for the definition of a refractory, if you have one.

A. A refractory is a heat-resistant material.

326 Q. You have testified you are a member of the American Society for Testing Materials. In 1957 they published a Manual of A.S.T.M. Standards on Refractory Materials. Are you familiar with this volume?

A. Not the 1957 volume; I am familiar with previous volumes.

327 Q. There is a definition for refractories that appears on page 192, of this volume. Would you read that and tell me whether you agree with that definition?

Mr. Travis: (For Pltf.) To which the plaintiff objects for the reason and unless Mr. Friesen will establish by this witness, or others, that we are concerned with refractory products, which we are not.

Mr. Friesen: (For Deft.) This is cross-examination, your Honor. I believe that it has relevancy.

Mr. Travis: (For Pltff.) This was gone into Saturday on our deposition, and Dr. Murray testified very clearly, and so will this witness, we are not concerned with refractory products. Sewer pipe is definitely not a refractory product.

The Court: And now your viewpoint. Just one at a time.

Mr. Friesen: (For Deft.) I am attempting to define the term, fire clay, your Honor, which I believe may need some light on it before this case is ended.

The Court: All right, overruled. You may answer.

Mr. Travis: (For Pltff.) I will not object to your asking for a definition of fire clay.

Mr. Friesen: (For Deft.) In due time.

A. You are asking me to read this definition?

328 Q. (By Mr. Friesen) And tell us whether you agree. [fol. 79] A. (Reading) "Refractories: In refractories the property of being resistant to softening or deformation at high temperatures."

329 Q. Do you agree with that definition?

A. For refractory products, yes.

330 Q. And turning to page 194, of the same volume, would you read the definition of low-duty fire clay brick, and tell us whether you agree with that definition?

A. (Reading): "Low-duty Fire Clay Brick. A fire clay refractory having a pyrometric cone equivalent not lower than 19 and a minimum modulus of rupture of 600 pounds per square inch."

331 Q. As a ceramics engineer, could you agree with that definition?

A. For refractory brick, yes.

332 Q. For low-duty refractory . . .

A. (Interposing) For refractory brick.

333 Q. Now, what other refractories are there than refractory brick?

A. Oh, there are glass pots, steel refractories, nozzles, ladles, refractories used in the aircraft industry, refractories used in ordinary household furnaces; of special shape there are just hundreds and hundreds of different varieties of materials called refractories.

334 Q. You called them "refractory." Would you call them "commercial refractory products"?

A. Yes.

335 Q. And you heard me ask Dr. Murray if he agreed with the definition of fire clay, which is reported in the A.S.T.M. C 71-51, and I believe he stated that he would not disagree with it. You have stated that you do not disagree with Dr. Murray. Does that mean you also agree with the definition of fire clay set forth by the A.S.T.M.?

[fol. 80] Mr. Travis: (For Pltf.) I suggest that the witness be furnished with the deposition rather than testifying blind.

Mr. Friesen: (For Deft.) I don't care, if you know the page number.

Mr. Travis: (For Pltf.) I don't; but instead of using your handwriting, why don't you give him the book?

Mr. Friesen: (For Deft.) I can give you the citation, if you find an error—I could not bring a copy of the book with me.

Mr. Travis: (For Pltf.) Show him the definition.

(Witness tendered definition in Mr. Friesen's handwriting.)

336 Q. (By Mr. Friesen) This definition, if you would read it into the record, and tell us whether you would agree or disagree with it.

A. I will read the definition. (Reading) "An earthy or stony mineral aggregate which has the essential constituent hydrous silicates of aluminum with or without free silica, plastic when sufficiently pulverized and wetted, rigid when subsequently dried, and of suitable refractoriness for use in commercial refractory products."

337 Q. Would you disagree with that definition?

A. This is a general definition of fire clay, and it is intended to cover refractory, commercial refractory products, —"commercial refractory products." There are other definitions of fire clays and there are other uses for fire clays, so I would say that fire clay is not restricted to commercial refractory products.

338 Q. But this definition would restrict fire clays to those materials which are suitable for use in making commercial refractory products, wouldn't it?

A. This definition does.

339 Q. Then you disagree with the definition?

[fol. 81] A. You have to define what grade or type of fire clay is being used before you can identify it with a product. Obviously, a low-duty fire clay could not make a high-duty refractory and it would not be good—very economical to use a high-grade fire clay for a low-duty product.

340 Q. But you are talking in terms of high duty and low duty. You already testified low duty has a pyrometric cone equivalent of 19 or better. Would you say the lowest fire clay suitable for making suitable refractories would be a pyrometric cone equivalent of 15?

A. Refractories, yes.

341 Q. What is your definition of fire clay?

A. It is very similar to that stated there, the definition which I just read into the record, except that it is not restricted to refractory products. Fire clay is essentially a mixture or aggregate of minerals made up primarily of hydrous aluminum silicates which can be formed with water into a plastic mass, dried and fired into a pre-determined shape, but not restricted to a particular product.

342 Q. The only way you differ with this definition, then, is in saying there are other products which a refractory may be used, refractory clay may be used for?

A. Yes.

343 Q. Would you still disagree with the definition that it must be suitable for use in making commercial refractories? I will grant that a refractory clay can be used to make common brick, but to be a fire clay, or refractory clay, must it not be suitable for use in making commercial refractories?

A. A fire clay does not necessarily have to be suitable for making refractories to be a fire clay.

344 Q. Then you disagree with the definition?

A. To the extent of the "use" term only.

[fol. 82] 345 Q. What does it have to be suitable for making, then?

A. Whatever product you are contemplating using it for. If you are going to use a fire clay for sewer pipe, it has to be of such a character and workability that it is capable of being used for sewer pipe.

346 Q. You can make sewer pipe out of shale, couldn't you, in some instances?

A. If the shale had the proper working characteristics.



347 Q. So, it does not need to be refractory working at all in sewer pipe, does it? Does not have to be a fire clay?

A. It does not have to be a fire clay.

Mr. Friesen: (For Deft.) I have no further question.

Redirect examination.

Questions by Mr. Travis:

348 Q. Mr. Clemens, you have read into the record, at the suggestion of counsel for the Government, two definitions of fire clay. I will hand you a copy of Revenue Ruling 54-550, adopted by the Internal Revenue Service of the United States Treasury Department in December, 1954, and ask you to read that definition by the Internal Revenue Service.

Mr. Friesen: (For Deft.) I object to using this witness as a means of just reading into the record. I have no objection to its being in the record or otherwise.

The Court: Overruled. It may be preliminary to another question.

Mr. Travis: (For Pltf.) It is not preliminary, and I will read it myself to your Honor, if you prefer it that way.

The Court: All right.

[fol. 83] Mr. Travis: (For Pltf.) This, your Honor, is the Revenue ruling to which I referred, which was brought out by the Government practically four years after fire clay became a subject of depletion under the Internal Revenue Code. (Reading)

"For the purposes of 1939 Code, Section 114" and so forth" as amended, a clay will be considered a refractory and fire clay if it has a pyrometric cone equivalent of 15 or higher. A clay having a pyrometric cone equivalent of less than 15 will not be considered a refractory or fire clay unless used or sold for recognized refractory purposes such as (but not necessarily restricted to) ladle lining."

Mr. Friesen: (For Deft.) Your Honor, may the record show the Revenue ruling was revoked some time ago.

Mr. Travis: (For Pltf.) I so stated.

349 Q. (By Mr. Travis) Mr. Clemens, you were asked on cross-examination at some length whether you would have purchased clay in Kentucky in 1951 from Mr. L. R. Chapman at \$1.40 per ton, as against mining clay, which you did mine, in 1951 at the approximate cost of \$2.41 per ton. Let me be sure about one thing. Was the clay which Mr. Chapman is now selling you accessible to your company in 1951?

A. No.

350 Q. Did Mr. Chapman at any time in 1951 offer to sell you any clay from Kentucky.

A. No.

351 Q. What kind of mining is it that Mr. Chapman does in Kentucky?

A. It is commonly described as "strip mining."

352 Q. What kind of mining were you doing in Cannelton in 1951?

[fol. 84] A. We were doing underground drift mining.

353 Q. It is a fact or not that strip mining is a much cheaper operation than underground mining?

A. It usually is cheaper.

354 Q. Then is that one of the factors that made you decide to obtain your clay, starting in 1957, from Mr. Chapman's mine in Kentucky?

A. Two factors were involved. Primarily the greatest factor was the easier workability of the clay, and the fact that it could be mined at a more reasonable cost per ton of mined clay.

355 Q. How far back in your Cannelton mine were you in 1957?

A. Taking all entries into consideration, we had several miles of entries.

356 Q. Were you reaching a point where the cost of mining was increasing with the distance you penetrated into the mine?

A. The cost of hauling to the surface was increasing.

357 Q. Is the vitrified sewer pipe manufactured by the Cannelton Sewer Pipe Company a refractory product?

A. No.

358 Q. Now, with regard to some of this transportation problem you were questioned about, is there any difference

in the weight of a given mass of clay when it comes to the mine than when it leaves your plant as a finished product?

A. Yes; there is a loss in weight in manufacturing.

359 Q. Approximately how much is that loss?

A. Approximately—you mean of the dry clay?

360 Q. Yes.

A. From the dry clay to the finished product is approximately 8 per cent.

361 Q. Would there be any difference in your answer if I asked you to use the clay as it comes out of the [fol. 85] mine and the weight of the Number 1 sewer pipe? What would be the percentage of the loss of weight be using those?

A. There is a loss in weight of the clay, itself, as well as a loss in manufacturing—the floor loss, or loss by breakage, going through the dryers, and the loss by breakage or other defects in going through the firing process.

362 Q. What percentage would the loss be as it comes from the mine and as it leaves your plant as a Number 1 sewer pipe?

A. Probably a total of 16 to 20 per cent.

363 Q. Upon your hauling a finished product, you are not hauling near as much weight as the original clay when it came out of the mine?

A. No.

364 Q. Is it important when you enter a new mine, or enter upon a new place for obtaining your clay, that you be guaranteed of a supply for a considerable period of time in the future?

A. Yes.

365 Q. In 1951 did you have available to you any figures showing the extent of any clay pit in Kentucky that could supply you for some years to come?

A. No, we did not.

366 Q. Had you made in 1951 any research, drill tests, surveys, and other things that you have testified this morning you had to do, regarding any Kentucky clay?

A. We did some sampling.

367 Q. From any particular pit?

A. From a great number of locations in the State.

368 Q. Had you completed a survey to the extent that you knew of a clay which was suitable for your product?

A. No.

[fol. 86] 369. Q. At the same time you were carrying on research in Kentucky for a period of five years prior to 1957, were you also prospecting in Indiana?

A. Yes.

370. Q. At the same time?

A. Yes.

Mr. Travis. (For Pltf.) That's all.

The Court: Recross?

Recross-examination.

Questions by Mr. Friesen:

371. Q. You state, Mr. Clemens, that the material in Kentucky was not accessible to you in 1951. Are you referring to the fact that you would have to carry it 17 miles rather than seven miles?

A. That, and the fact that we did not know whether or not the land under which the clay lies would be available.

372. Q. But that is all you mean by not being accessible?

A. There were no roads into the location at all.

373. Q. If I put in that presumption it would have taken 17 miles rather than seven, and the fact you didn't know if Mr. Chapman owned the land, or you didn't know who owned the land, with those two assumptions is that the reason you say it was not accessible in 1951?

Mr. Travis: (For Pltf.) I object. This is argument with the witness. The witness just gave another reason. He said there was no roads into it at all. That was not your question.

The Court: We have a three-way argument; overruled. You may answer and we will save time.

A. Will you state the question again?

374. Q. (By Mr. Friesen) Did you say there were no roads at all into the area?

A. Not where we were mining clay.

[fol. 87] 375. Q. How far from where you were mining clay was the closest road in 1951?

A. Probably four or five hundred feet.

Mr. Friesen: (For Deft.) I have no further questions.

Mr. Travis: (For Pltf.) Step down.

(Witness excused.)

The Court: We will have a recess at this time, gentlemen.

(Whereupon the Court was recessed at 3:25 p.m., and reconvened at 4:10 p.m.; at which time the following proceedings were had:)

The Court: Call your next witness.

Mr. Travis: (For Pltf.) Your Honor, I have one more witness and a deposition. Mr. Friesen, on the other hand, has two gentlemen here from Brazil, who are short witnesses and would not take long and if it is all right with the Court, I would consent we go out of order so he might put his two witnesses on the stand.

The Court: All right.

Mr. Friesen: (For Deft.) I call Mr. John C. Hutchinson to the stand.

The Defendant, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:

JOHN C. HUTCHINSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Friesen:

1 Q. Give your full name, Mr. Hutchinson.

A. John C. Hutchinson.

[fol. 88] 2 Q. And where is your home?

A. Brazil, Indiana.

3 Q. And how are you employed or in business?

A. I am Secretary-Treasurer of the Ayer-McCae'l Clay Company, Inc.

The Court: How do you spell that name?

The Witness: A-y-e-r M-e-C-a-r-e-l.

4 Q. (By Mr. Friesen) And where is the . . .



Mr. Travis: (Interposing for Pltff.) Is that a coal Company?

The Witness: Clay company.

5 Q. (By Mr. Friesen) And where is the plant of that company located?

A. It is located at Carbon, Indiana.

6 Q. How far is that from Brazil, Indiana?

A. Six miles.

7 Q. In what direction, approximately?

A. North of Brazil.

8 Q. Was—What does the Ayer-McCarel Company produce?

A. We manufacture structural facing tile, silo blocks, tank blocks, and filter blocks.

9 Q. Do you manufacture all of these products at your plant at Carbon?

A. Yes, sir.

10 Q. Do you have any other plants?

A. No, sir.

11 Q. What is the raw material from which you make these products?

A. Fire clay.

12 Q. And by "fire clay" what, specifically, do you refer to in the area around Brazil?

[fol. 89] A. Do you mean . . .

13 Q. (Interposing) What is it called?

A. From where it is mined.

14 Q. From where it is mined.

A. It is mined in open-strip mining.

15 Q. And do you know if it is associated generally with coal?

A. Well, this strata in the clay operation, Clay County, we have the overburden; if there is a vein of shale, the overburden, the hardpan; if there is a vein of shale, then the coal and then the clay.

16 Q. And do you know what this particular coal is called in your area?

A. In our area it is called top vein coal.

17 Q. Is that sometimes referred to as block coal?

A. Yes, sir.

18 Q. Does your company own a pit or mine for producing clay?

A. No, sir.

19 Q. From what source do you get the clay for your company?

A. We purchase our clay from the Turner Coal Company, Turner Coal and Clay Company.

20 Q. In the Year 1951, did you purchase all of your clay?

A. Yes, sir.

21 Q. Do you have any books and records available for the Year 1951?

A. No, I do not have.

22 Q. Were you associated with the company in 1951?

A. Yes, sir.

23 Q. In the same capacity as now?

A. Yes, sir.

[fol. 90] 24 Q. Have you at my request made some tabulations of current uses or purchases of clay for the years 1956 and '57?

A. Yes, I have.

25 Q. Now, based upon your knowledge of the business in 1951, can you refer to these figures and give an estimate as to how much clay you purchased in 1951?

Mr. Travis: (For Pltf.) To which, your Honor, the plaintiff objects for the reason that other than having company figures to me there could be no possible estimate based on '56 and '57, years which are not involved in our case here.

Mr. Friesen: (For Deft.) The man has been associated with the company for a number of years, including 1951, and based on his present production or use of clay, I am asking him to estimate what he probably used, admitting it is an estimate, in 1951. I think for the purpose of showing the market that these figures will be accurate.

The Court: Let's read the question again.

(The reporter read the last preceding question as follows: 25Q "Now, based upon your knowledge of the business in 1951, can you refer to these figures and give an estimate as to how much clay you purchased in 1951?")

The Court: Overruled.

Mr. Travis: (For Pltf.) May I ask a question?

The Court: No, sir; you may cross-examine. Overruled. You may answer. Yes or no, can you.

26 Q. (By Mr. Friesen) Can you make an estimate?

A. Yes, sir.

27 Q. Approximately, then, how much clay did you purchase in 1951?

A. My estimate, sir, would be 425 tons per week, or a [fol. 91] total for 52 weeks would be approximately 22,000 tons.

28 Q. And all of this was purchased?

A. Yes, sir.

29 Q. You mined none of it yourself?

A. No, sir.

30 Q. Mr. Hutchinson, we were in your plant yesterday, and picked up this from the yard. Can you tell if that is substantially the same appearance of clay that you converted into a ceramic product in 1951?

A. Substantially the same.

31 Q. Can you say there would be any variation from that in color, texture?

A. It could be a small variation in color or texture, depending upon the vein of the clay.

Mr. Friesen: (For Deft.) Your Honor, I don't want to burden the record by introducing this particular piece of ceramic into evidence. I think a comparison of color with the taxpayer's . . .

The Court: (Interposing) If this case goes up on appeal, how in the world will they decide whether I decided right?

(The defendant, for purposes of identification handed the reporter a certain object for marking, and which was by said reporter marked Government's Exhibit E.)

32 Q. (By Mr. Friesen) Do you know when this was manufactured?

The Court: Referring to Exhibit E?

Mr. Friesen: (For Deft.) Yes.

A. No.

33 Q. (By Mr. Friesen) Do you know that it was not manufactured within the past few months or years?

A. I wouldn't know, sir.

[fol. 92] Mr. Friesen: (For Deft.) I offer the Government's Exhibit E.

(Government's Exhibit E was offered in evidence at this time by Mr. Friesen.)

Mr. Travis: (For Pltf.) Mr. Hutchinson, do you know other than Mr. Friesen's statement that that came from your plant?

The Witness: Yes, sir, I do. That was picked up from our scrap pile as we walked by.

Mr. Travis: (For Pltf.) No objection.

The Court: There being no objection, Exhibit E is admitted and exhibited in evidence.

(Government's Exhibit E is admitted into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following to-wit:)

(Here insert.)

34 Q. (By Mr. Friesen) I believe you testified, Mr. Hutchinson, that you produced filter blocks?

A. Yes, sir.

35 Q. Are you in competition with the Cannelton Sewer Pipe Company in the sale of filter blocks?

A. Yes, sir.

36 Q. What market area do you cover?

A. Indiana, Illinois, Ohio, Kentucky, Tennessee, Missouri, and throughout the South, and some localities in the west, and some in the east.

37 Q. Have you on occasions successfully competed with the Cannelton Sewer Pipe Company?

A. Yes, sir.

Mr. Friesen: (For Deft.) I have no further questions.

[fol. 93] Cross-examination.

Questions By Mr. Travis:

38 Q. Have you ben in the court room since the beginning of the trial, Mr. Hutchinson?

A. I came when the Court opened this afternoon at two o'clock.

39 Q. Have you heard the various definitions of fire clay that have been read into the record?

A. Yes.

40 Q. Which one did you use in saying yours was fire clay?

A. Would you state your question again?

The Court: Read the question.

(The reporter read the last preceding question as follows: 40 Q "Which one did you use in saying yours was fire clay?")

A. Well, sir, I would call it fire clay; I have always known it as fire clay. I feel the definitions that were given covered it.

41 Q. (By Mr. Travis) Do you know anything about the clay that Cannellton mined until they moved over into Kentucky?

A. No, sir, I do not.

42 Q. Have you ever been down in their plant?

A. No, sir, I have not.

43 Q. Fire clay has a meaning in your industry, doesn't it, that is not too technical?

A. Yes.

44 Q. Don't most vitrified products producers in this area of the United States use what you call fire clay?

A. In most cases they do.

[fol. 94] 45 Q. Did your company keep books during the Year 1951 that showed the tonnage of clay which you purchased?

A. Yes, they did.

46 Q. So you had books of accounting?

A. I do not now; due to a change in the personnel of our organization, some of our records were destroyed.

Mr. Travis: (For Pltf.) If your Honor please, the plaintiff now moves to strike the testimony of an estimate which the witness gave in view of the fact there is a better evidence.

Mr. Friesen: (For Deft.) Your Honor, he testified the records have been destroyed. We are not asking the figures . . .

Mr. Travis: (Interposing for Pltf.) That does not allow anybody to make . . .

The Court (Interposing) Let's don't interrupt.



Mr. Friesen: (Cont'g for Deft.) . . . relative to the proposition which the Government is submitting this evidence for, an estimate of tonnage based upon, an educated person's estimate of tonnage used in 1951 is certainly relevant and admissible.

The Court: Did you understand, Mr. Travis, in the inquiry of the witness that the records are no longer in existence?

Mr. Travis (For Pltf.) Well, I didn't gather that. I understood him to say due to change of personnel they were not available to him.

The Witness: You may have misunderstood me. I said due to the change in personnel of our organization, the records were destroyed.

Mr. Travis: (For Pltf.) It still is not my understanding a witness can estimate records because the records were destroyed.

The Court: Your objection was there were available, accurate records, and you should not rely on his estimate. [fol. 95] That was the reason given for your objection. You want to strike out?

Mr. Travis (For Pltf.) Yes, I say there is better evidence.

The Court: Where is it? I say it is not before me. The witness said the records were destroyed. Do you have any other reason for your motion to strike out?

Mr. Travis: (For Pltf.) I think it goes solely to the fact, although there were records which would have proved exactly, I think that destroys the possibility of any witness estimating what those records would have showed.

The Court: All right, your motion will be denied. Any further questions? Does the Government have any further questions?

Mr. Travis (For Pltf.) I have some further questions; excuse me, your Honor.

47 Q. (By Mr. Travis) Your company filed an income tax return for the Year 1951 with the Federal Government, did it not?

A. Yes, sir.

48 Q. Is a copy of that return available to you?

A. Yes, sir.

49 Q. Could you reconstruct from that information the tonnage used?

A. It would show the clay purchased for that year.

50 Q. And you say that is available?

A. That would be available, sir.

Mr. Travis: (For Pltf.) Well, the plaintiff now renews its motion to strike out the estimate made by the witness for the reason that the records are available.

Mr. Friesen (For Deft.) Your Honor, I return to my contention: The reason and purpose we are offering this evidence, this is a—May I ask a couple of questions to show the basis of his estimate?

[fol. 96] The Court: All right.

Mr. Friesen: (For Deft.) How much clay did you purchase in 1956 according to the books and records of the corporation?

The Witness: In 1956 we purchased 20,722 tons.

Mr. Friesen (For Deft.) And in 1957, Mr. Hutchinson?

The Witness: 22,676 tons.

Mr. Friesen (For Deft.) Has your production between the Year 1950 and the Year 1957 varied substantially?

The Witness: It has been very uniform.

Mr. Friesen: (For Deft.) And did this knowledge of the uniformity of your production, is it the basis for your estimate which you have stated? Is that correct?

The Witness: Yes, sir.

The Court: Overruled, the motion is overruled.

51 Q. (By Mr. Travis) The only product that you made similar to the one made by the Cannelton Sewer Pipe Company is filter block?

A. That's right, sir.

52 Q. That is a rather large item of your production, is it not?

A. Yes, sir.

53 Q. Do you know of your own knowledge that is a small item in the Cannelton Sewer Pipe Company's production?

A. I didn't get the question.

54 Q. I say, do you know of your own knowledge that is a small item in the Cannelton Sewer Pipe Company's production.

A. Well, I wouldn't have any records to substantiate my statement other than I am personally acquainted with Mr.

Gene Clemens and Mr. Ed Clemens, and they told me their [fol. 97] tonnage on filter blocks has not been a large item. I could not prove the statements, no.

55 Q. Did you use any of the clay which you purchased in 1951 in the manufacture of vitrified sewer pipe?

A. No, sir.

56 Q. Do those records, which are not now available to you, also show the price you paid for this clay in 1951?

A. They would if I had them.

57 Q. From your general knowledge of the ceramic industry in Indiana, Mr. Hutchinson, would you say it was economically feasible for the Cannelton Sewer Pipe Company to buy fire clay in Brazil and haul it to Cannelton and make from it vitrified sewer pipe, vitrified clay sewer pipe?

A. Well, I am not familiar with their operating costs, but it would seem to me that it would be rather expensive. That would be my opinion in the matter.

58 Q. Assume that they had available to them in 1951 a mine containing suitable clay and shale for the manufacture of sewer pipe, which was one and one-half miles from their plant. Would you think it was economically feasible for them to buy clay in Brazil and haul it to Cannelton for their production?

A. I would not be familiar with their operating conditions or costs.

59 Q. Have you ever been engaged in mining clay at all?

A. No, sir. Our firm was at one time, but they are no longer engaged in it.

60 Q. When did they quit that?

A. Late '45 or early '46.

The Court: Assume he had to pay these freight charges in your hypothetical question. I will give them to you in [fol. 98] a minute . . . Freight rate, \$4.45 per ton, plus 3 per cent Federal tax, and another rate of \$8.60 per ton, plus 3 per cent tax.

61 Q. (By Mr. Travis) Mr. Hutchinson, assuming the transportation rate from Brazil to Cannelton, Indiana, was \$4.40 cents per ton . . .

The Court: (Interposing) 45 cents.

Q. (Mr. Travis con'tg) . . . \$4.45 per ton, plus 3 per cent freight tax, would you say it was economically feasible for the Cannelton Sewer Pipe Company to buy clay in Brazil and haul it to Cannelton?

A. I would not be familiar with the cost of their operation and the cost of their finished product, and that would be—that would govern.

62 Q. Well, assume in addition, then, their cost of mining clay from their own mine in 1951 averaged \$2.41 per ton, now what would be your answer?

A. Well, again, that would still be the policy of their production.

63 Q. You just don't want to answer that question, do you?

A. Well, I am not familiar with their business.

The Court: Let's ask him about his business, whether he would buy it from Cannelton.

64 Q. (By Mr. Travis) Mr. Hutchinson, what do you pay now for your clay in Brazil?

A. \$1.75 a ton.

65 Q. Unloaded in your plant?

A. Delivered to our bin.

66 Q. All right, assume you could purchase from Cannelton Sewer Pipe Company clay suitable for your manufacturing as you now carry it on, would you purchase that clay from them at \$1.75 and haul it to Brazil?

[fol. 99] A. I would purchase from our local concerns.

67 Q. Yes, in preference to hauling it any great distance at all. In fact, you don't haul it anyhow, do you?

A. About a mile and one-half or two miles.

68 Q. Your price is delivered into your plant?

A. That's right.

69 Q. So, you do no hauling?

A. We do no hauling.

70 Q. Actually, Mr. Hutchinson, it would not be economically feasible for you to buy clay in Cannelton with the freight rates I have given, even if it was given to you, would it?

A. That would depend entirely upon the product I was making and my production.

71 Q. I say in your production and similar clay to what you are using right now.

A. I don't know, sir.

Mr. Travis: (For Pltff.) That's all.

The Court: What do you mean, you don't know? You are Secretary-Treasurer of this organization. If you got the same price, the same costs, and you had to pay \$4.45 freight rate, could you compete with these other businesses?

The Witness: That would depend entirely upon your production costs.

The Court: You know what your production costs are right now, don't you?

The Witness: Fairly close.

The Court: Assuming they are the same, could you absorb another \$4.45, plus 3 per cent freight tax?

The Witness: I still would patronize the local concerns.

The Court: Suppose you could not get it there; suppose you couldn't get it at Brazil, and had to buy it [fol. 100] down in Cannelton and had to pay \$4.45 more than you are now, plus 3 per cent freight tax could you compete in the market?

The Witness: Well . . .

Mr. Friesen: (Interposing for Deft.) Could we add in the Chicago market, your Honor?

The Court: The market he has named.

The Witness: Well, it would make our competition pretty hard, because we would have a hard time securing business.

The Court: All right, redirect?

Mr. Friesen: (For Deft.) I have no further questions.

Mr. Travis: (For Pltff.) That's all.

(Witness Excused)

CHARLES N. SMITH, a witness, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Friesen:

1 Q. Give your full name to the Court, Mr. Smith.

A. Charles N. Smith.

2 Q. And where do you reside?

A. Brazil, Indiana.



3 Q. And where are you employed or in business?

A. G. and F. Corporation.

4 Q. And what is the business of the G. and F. Corporation?

A. We are principally coal miners, strip coal miners.

5 Q. What is your position with that company?

A. Secretary-Treasurer.

6 Q. Do you also sell clay, meaning the corporation of which you are the Secretary-Treasurer?

A. We do.

[fol. 101] 7 Q. And in 1951 did you sell clay?

A. We did.

8 Q. Have you at my request taken from the books and records of the corporation the tonnages of clay which you sold in 1951?

A. I have a statement prepared under my direction.

9 Q. And were these statements prepared from the books and records of the corporation?

A. They were.

10 Q. To whom did you sell clay in 1951?

A. In the Year 1951 we sold clay to the Brazil Clay Company, Brazil Hollow Brick and Tile Company, the then National Fireproofing Company, and the American Vittrified Products Company.

The Court: Are they all in Brazil, Clay County Area?

The Witness: They are.

Mr. Travis: (For Pltf.) What was it? National what?

The Witness: At that time National Fireproofing Company.

11 Q. (By Mr. Friesen) Is that now called "Nateco"?

A. Now called Nateco Company.

12 Q. Now, do you have the figures with you of the amounts sold to each of the companies in 1951?

A. I do.

13 Q. How much clay did you sell to the Brazil Clay Company in 1951?

A. Our 1951 sales, Brazil Clay, 52,609.47 tons.

14 Q. And the Brazil Hollow Brick and Tile?

A. 14,371.95 tons.

15 Q. And to the National Fireproofing Company?

A. 20,062.55 tons.

16 Q. And to the American Vitriified Ceramic Company?  
[fol. 102] A. American Vitriified Products, 34,211 tons.

17 Q. Do you know what the American Vitriified Products Company makes?

A. I believe they make sewer pipe.

18 Q. Do you have a total figure of your sales during that year?

A. Our sales for that year, tonnage sales, was 121,318 tons.

19 Q. Now, from what source did that clay come?

A. That came from our open-cut mining pits where we had deposits of Brazil block coal, and clay was under the block coal.

20 Q. Now, do those figures include any shale?

A. Yes, it includes shale.

21 Q. Which of the figures included shale?

A. The figures for National and American Vitriified contained some shale.

22 Q. Would you give the amounts, please?

A. I can not break them down specifically, but the 121,318 ton total for the year, 14,247 ton of that total was shale.

23 Q. And from what source did you get that figure?

A. From our records and from the report to the Bureau of Mines of clay and shale produced in 1951.

24 Q. What do you call the clay which you sell? What typical name do you put on this underclay?

A. Well, in our report in 1951, and the previous years to that, and the years before that, we have put it under the heading "Slip Clay."

25 Q. Is that what it is generally referred to as?

A. Probably, but in the nomenclature given here, we saw no other place to put it.

26 Q. Do you know what slip clay is?

A. No, I do not.

27 Q. All the clay and shale which you mined, came from underneath the block coal, is that right?

[fol. 103] A. That's right.

28 Q. Do you have a trucking operation presently connected with your company?

A. Yes.

29 Q. How many trucks or approximately how many does the company own and operate?

A. At the present time in the neighborhood of 35 units.

30 Q. And in 1951 do you know how many you would have had?

A. That would be a larger number, due to the change in our trucking industry; would possibly be in the sixties.

31 Q. What is the furthest point your company has transported the clay you sell?

A. The furthest point to which we ever transport has occurred in the last two years trucking clay to Hobart, Indiana, Natco.

32 Q. What part of the State is that?

A. Northern part.

33 Q. How far is that from Brazil?

A. Round trip, 330 miles.

34 Q. One way would be 165 miles?

A. That's right.

35 Q. What do you deliver to them?

A. We deliver clay to them.

36 Q. No shale?

A. No shale.

37 Q. You say Natco?

A. That is National at Hobart.

38 Q. Do you know what they produce at Hobart?

A. I have never been in Hobart. I understand they produce conduit, but I don't know the fact.

39 Q. Have you been associated with the trucking business in any way?

[fo: 104] A. Only insofar as keeping the records.

40 Q. Do you know the ton-mile cost of transporting clay?

A. At what period of time, sir?

41 Q. Well, if you know, in 1951.

A. In 1951 our operations of trucking are primarily concerned with the sale of coal. Our trucking operations are not done to make a profit; they are instant to the sale and distribution of our coal. The clay is actually a by-product with us. Most of our revenue is from the sale of coal, and our per-ton cost of transporting both our coal and clay within a four-or-five-mile area of Brazil was 80 cents a ton on a ton-mile basis. On the number of miles we were hauling the material, it would be about 1.8 cents.

42 Q. Per ton mile?

Mr. Travis: (For Pltf.) I didn't get the distinction between the 80 cents and the 1.8 cents.

The Witness: 80 cents a ton over-all, regardless of . . .

Mr. Travis (Interposing for Pltf.) And 1.8 cents per ton mile?

The Witness: Yes.

43 Q. (By Mr. Friesen) Do you know if you could make a profit on shipping at 1.8 cents per ton mile?

A. On the basis our operations were incidental to getting the product, and we were making a profit on the sale of the product, I don't believe you could make a profit on 1.8 cents.

44 Q. That was strictly the cost?

A. That was strictly the cost.

45 Q. Would the transportation of coal per ton mile be substantially different from the transportation of clay per ton mile in your opinion?

A. No.

[fol. 105] Mr. Friesen: (For Deft.) That's all. I have no further questions.

The Court: Cross-examine.

Cross-examination.

Questions by Mr. Travis:

46 Q. Mr. Smith, let's get this ton mile straightened out. You said 80 cents per ton for a four-or-five-mile haul?

A. That's right.

47 Q. How do you get 1.8 cents per ton out of that?

A. Well, sir, what are you going to start with, the factor, as your ton load? This thing can vary. I think we have to have a decision as to the factor, because some individuals will haul with trucks which will haul five tons.

48 Q. How did you arrive at the 1.8 cents per ton from the figures you gave of 80 cents per ton for a distance of four or five miles? Now, give me your factors, if you have any there. It seems like simple arithmetic to me.

A. Our trucks will haul, in 1951 will haul an average of 11 to 12 to 13 ton per load.

49 Q. What has that got to do with ton mile?

A. If you had 11-or-13-ton load, and 80 cents a ton, we would have \$9.60 for taking a 12-ton load.

50 Q. Where do you work the ton mile in here? You have not used any miles in your calculation.

A. I divided the number of miles we were operating.

51 Q. All right. Let me ask you if the cost—if it cost you 80 cents per ton to transport one ton four miles, isn't that 16 cents per ton mile (20 cents per ton mile)?

A. If our cost were 80 cents per ton.

52 Q. (Interposing) Could you answer my question? It is simple arithmetic. Can you divide four into eight and come out with two?

[fol. 106] A. If you divide four into eight, you will come out with two.

53 Q. If you divided four miles into 80 cents, you come out with 20, don't you?

A. Well, apparently you and I are figuring ton mileage different, sir.

54 Q. I wish you would explain how you figured it.

Mr. Friesen: (For Deft.) Your Honor, I missed the number of miles his average run was. How far did you say your average run was?

The Witness: Our average point of delivery is four to five miles.

The Court: You have a question before you now, Mr. Witness. Will you explain to him your ton mile of 18; give your factors, and your reasons for that?

55 Q. (By Mr. Travis) Have you a calculation you made?

A. I am looking on the back of my information to see where I made the calculation. I don't have it here, sir.

The Court: Do you want to correct your ton-mile figure there, or do you have some other information?

The Witness: I would want to correct it, yes, if after checking it through it is incorrect.

Mr. Friesen: (For Deft.) May we ask him to check this, and if he wants to change that, I would be happy to stipulate, rather than calling him back tomorrow as to what his figure is, if it is 20 cents per ton mile; otherwise, I would be glad to call him back to explain his computation. He obviously does not have the figures with him.

Mr. Travis: (For Pltf.) I would be glad to proceed with this cross-examination.



56 Q. (By Mr. Travis) Would you take your pencil out? [fol. 107] The Court: You proceed with your cross-examination.

57 Q. (By Mr. Travis) Now, then, it cost you 80 cents per ton to haul coal?

A. And/or clay.

58 Q. Then you haul it four miles?

The Court: Or five, he said.

Mr. Travis: (For Pltf.) I have to use one; you can't give both of them.

59 Q. (By Mr. Travis) Use the example four miles. Now, how much per ton mile does it cost you to haul clay on those two figures?

A. Well, if you base it on those two figures, it would be 20 cents, sir.

The Court: You proceed with your cross-examination.

The Court: Redirect?

Redirect examination.

Questions By Mr. Friesen:

60-Q. Mr. Smith, do you believe the figure that you have given, 1.8, to be correct based on the computation you made at your office, or do you think it should be .18?

The Court: Might I suggest was your 80 cent figure for 12 tons, four miles or five miles, or 80 cents per ton?

The Witness: Our 80 cents per ton for four or five miles.

Mr. Friesen: (For Deft.) I have no further questions, but I would like to have the opportunity to recall Mr. Smith, if he finds . . .

The Court: (Interposing) Why don't you move that at that time?

[fol. 108] Mr. Friesen: (For Deft.) I have no further questions.

Mr. Travis: (For Pltf.) That's all.

The Court: Was there any evidence here, Mr. Travis, from your first witness—before this witness here leaves the room—as to the size of the coal vein in the Cannelton Area there in 1951 above the clay and shale in the mine?

Mr. Travis: (For Pltf.) Let me see if I understand you there. Mr. Clemens testified that the average vein of fire

clay, which laid immediately under the coal, was six foot and shale, two to four feet, and average, three feet. Sixty-four was the ratio.

The Court: But he said something about a coal layer. How about that?

Mr. Travis: (For Pltf.) But they don't take any coal out.

The Court: I understand. But what was it? Did he answer that?

Mr. Travis: (For Pltf.) I don't believe he answered that.

(To Mr. E. C. Clemens) Do you know how thick the coal is above your fire clay?

Mr. E. C. Clemens: About 12 inches.

The Court: The Court would be interested in the expert witness that left the stand, if you inquire of him, ask him a hypothetical question if he could make a profit at his figure of selling this by-product, if he had to mine two feet of coal, 24 inches of coal, down in the Cannelton Area.

Mr. Travis: (For Pltf.) I purposely didn't go into that. I would be glad to, if your Honor wishes to be informed.

Mr. Friesen: (For Deft.) Your Honor, the Government [fol 109] will offer to show the people are mining clay in the Brazil Area without any coal.

Mr. Travis: (For Pltf.) Mr. Smith, will you take the stand, again?

The Court: I don't want to insist upon it, if it is not within your strategy.

Mr. Travis: (For Pltf.) No.

CHARLES N. SMITH, a witness on behalf of the defendant, having been recalled to the stand, testified further as follows:

#### Further Cross-examination.

#### Questions By Mr. Travis:

61 Q. How much tonnage of coal did your company mine in 1951?

A. I don't have those figures here, because they were not requested of me; but in our years '50, '51, and '52, the figures exceeded, clay figures exceeded the coal.

62 Q. Yet you say the clay is a by-product of your coal business?

A. That's right.

63 Q. You are intentionally in the coal business?

A. We sell the clay we have a demand for, the local companies want, but, primarily, we are strip miners of the coal.

64 Q. What do you do with the coal above the clay or shale?

A. If the companies want it, we sell it. There is very little sale in our territory.

65 Q. You just have to dump and pile it?

A. That's right.

66 Q. And the fire clay that you sell lies directly under the coal?

A. Yes, the clay we sell is underneath the coal.

[fol. 110] 67 Q. What is the thickness of your coal vein generally?

A. Generally runs 36 to 40 inches.

68 Q. What is the thickness of the fire clay?

A. Anywhere from four to six feet.

69 Q. As long as you have to take off the coal for your primary coal business, you can mine that fire clay very cheaply, can you not, because your equipment is right there?

A. When we are through with loading coal, the clay is exposed and all we have to do to get it out is put the loading shovel in and scoop it up.

70 Q. Otherwise, it would not be worth a nickel to you, would it?

A. No.

71 Q. Do you have any figures, comparative figures, on the dollar sales in 1951 of clay and coal?

A. I have them in my brief case.

72 Q. Would you get them, please?

A. (Witness gets data.) In the Year 1951, our coal sales were \$650,414. Our clay sales were \$194,198.

73 Q. What is your estimate of how much clay, by tons, you mined in 1951 more than coal?

A. I would say in the neighborhood of 10,000 tons.

74 Q. Can't you give a pretty good guess of the number of the tons of coal from the gross figure?

A. Yes, I would say that is roughly 110,000 tons.

The Court: What is the size of your Brazil block coal vein there?

The Witness: In height it would run 36 to 40 inches.

The Court: Could you economically mine that coal and the clay by-product if it was a 24-inch vein?

The Witness: Again that would get into the question of what is the nature of the overburden above the coal. Is [fol. 111] it easy digging or is it rocks we have to shoot?

The Court: Suppose it is the same as you have there.

The Witness: Our profits would be narrowed down considerably.

The Court: Could you economically do it?

The Witness: We could.

The Court: All right.

75 Q. (By Mr. Travis) You don't know anything about clay, you say?

A. No.

76 Q. What did you sell that clay for in 1951, average?

A. Our clay was all sold at one standard price, \$1.60 ton delivered.

77 Q. Delivered how far?

A. Four to five miles.

78 Q. Now, this clay that you hauled up to Hobart, you didn't deliver it up there for \$1.60, did you?

A. Oh, no, sir.

79 Q. What did you charge to deliver up there?

A. For the delivery, or the delivered price on the clay do you wish?

80 Q. I guess either one.

A. The delivered price of clay to Hobart, delivered in their bin, \$5.65.

Mr. Travis: (For Pltf.) That's all.

Further Redirect examination.

Questions By Mr. Friesen:

81 Q. Mr. Smith, how did you compute the figure, \$5.65, to charge the people in Hobart?

A. To arrive at that figure, Hobart asked if we could supply them with clay. We told them we could. We de-

terminated what the rail competition was to get into Hobart. [fol. 112] We did some figuring as to what they would—expense they would have to go to to unload it out of the railroad car, which necessitated the use of public clam shovel; would have to have a truck to load it from the railroad car into the truck, and take it over to their bin. Combining all those factors, we added to it f.o.b. price we wanted.

82 Q. In other words, you charged them what the traffic would bear, is that right?

A. That's right.

Mr. Friesen: (For Deft.) I have no further questions.

Mr. Travis: (For Pltf.) That's all.

The Court: All right, sir.

(Witness excused.)

The Court: Call your next witness.

Mr. Friesen: (For Deft.) We would call our other witnesses tomorrow. I would like to request the gentlemen be excused.

Mr. Travis: (For Pltf.) Yes.

Mr. Friesen: (For Deft.) Do you want them back tomorrow?

Mr. Travis: (For Pltf.) No.

The Court: It has reached the hour of five o'clock. Are there any other witnesses, Mr. Travis, that you have you would like to resolve here this evening?

Mr. Travis: (For Pltf.) No, your Honor. My other witnesses will remain over tonight.

The Court: I recommend that you consider identifying the exhibits of shale here. You have a lot of testimony in the record about it.

We will stand adjourned until 9:30 tomorrow morning.

(Whereupon the Court was adjourned at 5:00 o'clock p.m. to reconvene March 12, 1958, at 9:30 o'clock a.m.)



[fol. 113] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Cause No. IP 57-C-163

CANNELTON SEWER PIPE COMPANY, a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

Indianapolis, Indiana, March 12, 1958. 9:45 o'clock a.m.

(The Court met pursuant to adjournment, and the trial was resumed as follows:)

The Court: Good morning, gentlemen. Call your first witness.

The Plaintiff, to further maintain the issues on its behalf, offered and introduced the following testimony, to-wit:

EDWARD F. CLEMENS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions By Mr. F.

1 Q. State your name and place of residence, please.

A. Edward F. Clemens, Cannelton, Indiana.

2 Q. And what is your occupation?

A. I am President of the Cannelton Sewer Pipe Company.

3 Q. How long have you been connected with that company?

A. 42 years.

4 Q. How long have you been the President?

A. 13 years.

[fol. 114] 5 Q. How old is the Cannelton Sewer Pipe Company?

A. The Cannelton Sewer Pipe Company was organized in 1908, and construction of the plant was begun, and we began operations in August, 1909.

6 Q. And have the products manufactured been substantially the same ever since that date?

A. They have.

7 Q. Your principal products?

A. Vitrified sewer clay pipe, flue lining, wall coping, and some filter block.

8 Q. What were the net sales of manufactured products of the Cannelton Sewer Pipe Company in the fiscal year ending November 30, 1951?

A. I will have to get the evidence to refresh myself here. (Witness tendered data). Net sales of manufactured products, as shown by our revenue report, were \$1,409,145.66.

9 Q. In connection with that figure that you have just given, it is true, is it not, that we have had a discussion with Mr. Friesen this morning as to the possible inaccuracy which will be corrected by your accountants and the Revenue Service?

A. That is correct.

10 Q. But substantially that is the amount, is that right?

A. Yes.

11 Q. That is the amount that was computed by your C.P.A.'s?

A. That is correct.

12 Q. And will be corrected.

A. Yes.

(The plaintiff, for purposes of identification, handed the reporter certain documents for marking, and which were by said reporter marked Plaintiff's Exhibit 18-Part 1 and Plaintiff's Exhibit 18-Part 2.)

[fol. 115] 13 Q. (By Mr. Travis) I hand you what has been identified by the reporter as Exhibit 18, Parts 1 and 2, consisting of six pages, and ask what that is.

A. This is a letter from the Internal Revenue Department, relative to our claim for depletion allowance for the years ended November 30, 1951 and the carry-back on November 30, 1950.

14 Q. That letter, together with the computations attached, was from the Cincinnati Region, Appellate Division, of the Internal Revenue Service, is that correct?

A. That is correct, yes, sir.

15 Q. At Indianapolis.

A. Yes.

Mr. Travis: (For Pltff.) Plaintiff offers Exhibit 18 in evidence.

(Plaintiff's Exhibit No. 18 was offered in evidence at this time by Mr. Travis.)

Mr. Friesen: (For Deft.) I object to the admission of this unless it is shown to be relevant to the problem before us. I believe we have two basic questions of fact here. I would like to know what relevancy it has.

Mr. Travis: (For Pltff.) The relevancy that it has, your Honor, is that in the computations made by the Revenue Service on which the final tax of the plaintiff was assessed, says, has a computation called "Fire clay."

Mr. Friesen: (For Deft.) Your Honor, I don't believe it is relevant to show the Government has changed its position, but if that is relevant, why we should also like the opportunity to show they have changed their position several times in the course of coming to task.

The Court: Well, the objection will be overruled and Exhibit 18 will be admitted and read in evidence.

[Vol. 116] (Plaintiff's Exhibit 18-Part 1 and Plaintiff's Exhibit 18-Part 2, a total of six pages, are admitted and read into the evidence, and made a part of the record in this case, said exhibits being in the words and figures following, to-wit:)

(Here Insert.)

16 Q. (By Mr. Travis) Mr. Clemens the computations attached to Exhibit 18, are those the final computations on which the tax was assessed against your company for that year by the Internal Revenue Service?

A. They are.

17 Q. Calling your attention to page 2, of Part 2, of Exhibit 18, in Schedule 2 there is shown a determination of the deduction for percentage depletion as computed by the Revenue Service. Is that true?

A. That is true.

18 Q. What two classes of minerals are shown on that exhibit as being allowed percentage depletion?

A. Fire clay and shale and tile clay.

19 Q. Can you tell, Mr. Clemens, what the theory used by the Revenue Service was in computing the percentage depletion for that year, the Year 1951?

A. The . . .

The Court: Let the record show the witness is examining Exhibit 18.

A. (Cont'g) The Revenue Department allowed 15 per cent on sales of fire clay, which amounted to \$484,742. They allowed 5 per cent on a valuation they set up for the gross income from mining, which, as I recall it, included the processes up to and including the grinding for use in a pug mill or wet pan. They did not beyond that point. And that amount of gross income which they set up was \$233,747, on which 5 per cent was allowed.

[fol. 117] 20 Q. Your company sells some of its clay in the form of ground fire clay. Is that true?

A. That is correct.

21 Q. What is the ground fire clay?

A. The ground clay which we sold is the material that has been ground and screened to a fine powder, and is used in laying up refractory materials.

22 Q. What were the total tons of clay mined by your company in the fiscal Year 1951?

A. 38,474 tons.

23 Q. And how much of that was sold in the form of ground fire clay?

A. 79,625 tons, practically 80 tons.

24 Q. And what was the price which your company received for those 79,625 tons?

A. \$22.88 per ton.

25 Q. What was the total income, gross income, from those sales?

A. I do not have that here. I would have to refresh my memory on that. I have the net amount. But it is about \$1822.00, as I recall it. (Witness tendered document.) No. It is \$1822.45. That is the gross.

26 Q. That was the total?

A. That was the total sales' price.

27 Q. Out of the Million Four Hundred Thousand net sales for the company for that year?

A. That's right.

28 Q. Does your company also have pending with the Internal Revenue Service claims for refund for the year following 1951?

A. We do.

29 Q. Have those—No decision has been rendered on any of those, has it?

A. No final decision.

30 Q. But taxes have been assessed by the Internal Revenue Service?

[fol. 118] That's correct.

31 Q. For each of the years since 1951?

A. That is correct, up to and including 1955.

32 Q. What, if you know, was the theory used by the Revenue Service in assessing your taxes and computing your percentage depletion for the fiscal Year 1952?

A. In 1952 the sales were allocated as between mining and manufacturing, and the mining cost was carried up to the point where the clay was ground and screened and ready for use in the wet pan. To that sum was added an overhead which consisted of a fixed portion of the administrative general expenses and the factory overhead, which was properly allocable to that particular percentage of our costs.

33 Q. In other words . . .

A. (Interposing) On that basis, they allowed, as I recall it, 15 per cent on 60 per cent of the sales, and 5 per cent on 40 per cent of the sales.

34 Q. For that year, then . . .

A. (Interposing) For the year 1952.

35 Q. For that year, then, the Revenue Service did recognize that 60 per cent of your mined product was fire clay?

A. Yes.

36 Q. Then for the years 1953 and '54 and '55, if you know, what was the theory on which the Internal Revenue Service computed your allowable depletion and your income taxes?

A. During those three years they computed depletion based on a fixed—what they claimed "market value" of the clay at \$7.00 per ton, on which they allowed us 15 per cent on 60 per cent of the tonnage shipped, or tonnage produced, and 40 per cent on 5 per cent of the tonnage pro-



duced. That amount was reduced by taking the limitation of 50 per cent of the profit which they estimated we had [fol. 119] received on the clay up to the \$7.00 a ton price; in other words, 50 per cent of the difference between what they calculated the cost was and \$7.00 per ton.

37 Q. I believe in all of the years we have been talking about, the 50 per cent limitation provided by the statute applied in your particular case did it not?

A. I am not sure about '51 or '52; I do know it did—I think that it did, I am not sure, but I do know it did in the other subsequent years.

38 Q. As President of Cannelton Sewer Pipe Company, are you particularly interested in the financial aspects of the company and those things that go into whether you make a profit or stand a loss?

A. I am. That section of the business is directly under my jurisdiction.

39 Q. Is one of your prime considerations in operating costs the hauling expense that you have in getting the raw clay to your plant?

A. It is.

40 Q. Have you informed yourself throughout your tenure as President of the company, as to your costs of hauling?

A. We segregate each year the hauling costs as part of our mining costs.

41 Q. During 1951, when you were using your own mine, approximately a mile and one-half from the plant, what did you estimate, or, what was the ton-mile cost of getting your clay to the plant?

A. 9.3 cents per ton.

42 Q. Is that hauling cost fairly uniform through subsequent years, or not?

A. Yes; it has increased slightly in subsequent years.

43 Q. Based upon your own actual experience, what would be the hauling cost from Huntingburg to Cannelton of the clay?

[fol. 120] I would say from \$2.50 per ton to \$3.00 per ton.

44 Q. And from Brazil, Indiana, to Cannelton?

A. From \$5.50 to \$6.00 per ton.

45 Q. During 1951, or in any years subsequent thereto, would it have been economically feasible assuming you

could obtain a fire clay and shale of the exact type and mixture that you were taking from your own mine to have purchased clay in Huntingburg at a price of \$3.25 per ton and hauled it to Cannelton?

A. It would not.

46 Q. Would it have been economically feasible for you to have mined clay in Huntingburg and hauled it to Cannelton?

A. It would not.

47 Q. Would those same answers apply to Brazil?

A. They would.

48 Q. Could you purchase fire clay in Brazil for \$1.60 a ton and economically—and haul it to your plant in Cannelton and make a profit on the finished product?

A. We might make a very, very slight profit, but it would be so small, there would not be much return on the investment.

49 Q. There has been considerable discussion, Mr. Clemens, in this case regarding the quality of the under-clay which was mined by your company from the mine you were using in 1951. What kind of clay was that, in your opinion?

A. That was a fire clay . . .

Mr. Friesen: (Interposing for Deft.) I object to the question and answer, and moved that it be stricken; that he not has shown himself qualified as an expert on the subject of clays.

Mr. Travis: (For Pltf.) Your Honor, he has been manufacturing this for 42 years. He has been connected with [fol. 121] that company for 42 years. I think that, in itself, being the highest executive officer, would of necessity require him to know what the products were they were using.

The Court: Well, I will overrule it. Proceed.

Mr. Travis: (For Pltf.) That was just a preliminary question to something else anyway.

50 Q. (By Mr. Travis) Has there been any other producer of clay products that used clay and shale out of the same vein that you were mining in 1951?

A. There was a producer who used it in previous years; not in 1951.

51 Q. Well, the same vein you were using in 1951?

A. Yes.

52 Q. Where did they take that from, whoever took it?

A. They took fire clay from a vein, approximately, from the same vein at a location approximately one and a half miles east, one to one and one-half miles east to the opening we had in 1951. It is in the same hill.

53 Q. In the same hill?

A. Yes.

54 Q. What company was that?

A. Cannelton Clay Products Company.

55 Q. What did they produce out of that clay?

A. Second-quality fire brick.

56 Q. Fire brick?

A. Yes.

57 Q. Was that a refractory product?

A. Yes, it was.

58 Q. How long did that company produce fire brick out of that mine?

A. They went in business in 1917 and quit about 1928.

59 Q. Mr. ...

[fol. 122] Mr. Friesen: (Interposing for Deft.) Your Honor, I object to that line of questions and answers in that it shows no relationship to the Year 1951, and with the testimony that clay varies both laterally and vertically, it is somewhat remote to the problem before us.

The Court: Overruled.

Mr. Travis: (For Pltf.) I am through with that line of questioning, anyway.

60 Q. (By Mr. Travis) Mr. Clemens, is there any reason why you use fire clay in the manufacture of sewer pipe in Cannelton, Indiana?

A. There is.

61 Q. And what is that reason?

A. Fire clay is necessary to hold the product in shape by reason of its long vitrification range, enabling us to burn it to a steel hardness and thoroughly vitrify it over a long range of burning. If something of this nature is not used, with the shale that we were using, the material would have a tendency to go out of shape in the burning.

62 Q. You could not, from your testimony I take it,

have made a quality sewer pipe out of the shale alone?

A. No, sir. For a great many years, beginning in 1912, shortly after we started in business, our company promoted and advertised Cannelton pipe as sewer pipe of a quality made of Ohio River fire clay. That was our slogan. We attempted to live up to it; and the tests that were made by the various universities and State Highway Department indicated that we have a product which is extremely high in quality and in crushing strength. We have attempted to live up to it, that slogan, and make a high-quality products. Actually, we have a number of engineers who specifications read "Cannelton pipe or equivalent."

[fol. 123] 63 Q. By "Cannelton pipe" they mean the pipe manufactured by your company?

A. Yes, sir.

64 Q. Are you familiar with tests that have been run by the State Highway Commission? You said you were. Have they found from those tests that your pipe was the highest quality made in Indiana?

A. I don't know how their comparison would run, but since 1932 they have been testing our pipe for use in the State Highway Department and on State Roads. In all that time we have never had a piece of pipe to fail any of the tests, and I don't believe any other manufacturer in the State could make that statement.

The Court: By "State Highway Commission" you mean Indiana or Kentucky?

The Witness: Indiana State Highway Department tested it.

The Court: All right.

Mr. Friesen: (For Deft.) I object to that answer, and I am quite sure it involves hearsay, which we have no chance to cross-examine the men who were the ones that tested this from the State Highway Department, or to know exactly what tests are involved.

The Court: You have rebuttal. The objections are coming a little late. I advise you to get on your feet when these questions are asked. It is hard for me to wring that out of my mind.

Mr. Travis: (For Pltf.) Your Honor, it is already in the record in Dr. Murray's deposition which was unobjected to at the time.

65 Q. (By Mr. Travis) Mr. Clemens, the change in the Internal Revenue Code, which allowed percentage depletion for clay for the first time went into effect January 1, 1951. You are familiar with that?

A. Yes, sir.

[fol. 124] 66 Q. Did you change any of your methods down there in the way of mining or selling or manufacturing solely on account of the change in the Internal Revenue Code?

A. No, sir.

67 Q. And until you started negotiating—getting clay in Kentucky instead of Indiana, your entire business went along just the same, before and after?

A. Yes, sir.

68 Q. (Cont'g) . . . the change in the Revenue Code.

A. Yes.

69 Q. Does your company maintain a permanent research department?

A. We do. We are the only manufacturer in this area that does.

70 Q. What do you do in that?

A. We are continually testing raw materials, testing our schedules, trying to develop new products and doing our—the men in there help on the clay prospecting. It is a general range both controlled and research laboratory.

71 Q. Over the years have you invested and spent quite a bit of money in that research program?

A. We have.

72 Q. How many industrial plants are there in Cannelton today?

A. Well, we have our plant there, and there is another small plant, the Mid-West Safe Company, who employs a few people; other than that, there is no industry.

73 Q. Your company is substantially the whole industry of Cannelton, isn't that true?

A. Yes, sir.

74 Q. There has been a reference made to the fact that at one time there possibly was some clay mined in Huntingburg which was hauled and manufactured into products [fol. 125] at Louisville. Are you familiar with that at all?

A. Yes, sir. There was a sewer pipe mined in Louisville a number of years ago who, I think, got some clay, I think



they got some clay from Huntingburg, or just west of there, and shipped it into Louisville.

75 Q. There was another company that made stoneware, that did that, is there?

Mr. Friesen: (For Deft.) Mr. Travis, are you testifying?

Mr. Travis: (For Pltf.) I was asking what we all knew and I forgot.

76 Q. Is the cost of raw clay for making your products and those for making stoneware products different? That is, in comparison of the sale of the finished product.

A. The percentage of the sales' part of the finished product that is brought about by the raw clay is much greater on sewer pipe than it would be on stoneware.

77 Q. So that the cost of the clay is a bigger factor to you?

A. Yes, much larger factor.

78 Q. Now, in regard to this clay that you are now getting from Kentucky, and which you have contracted for the mining and hauling, is the fact it is in Kentucky of any significance to you?

A. Well, I don't know what you mean exactly.

79 Q. Well, might you have done it if it was in Indiana as well as Kentucky?

A. Yes, we were—As a matter of fact we began prospecting for a strip mine deposit in 1950, and we tested clays all over the area immediately around Cannelton, in preference to going across the river. In going across the river, we would find that it is necessary to have an extremely large storage shed, because of the delays which come in [fol. 126] the wintertime, due to high waters which put the ferry out of commission, and due to the ice which occasionally gets in the river—did this year; stopped the ferry traffic. For that reason we exhausted our efforts to find a suitable clay in Perry County and Spencer County just before going to Hawesville and making tests on large scale.

80 Q. Did you ever open a strip mine in Indiana?

A. We opened a strip mine about 11 miles from Cannelton in Spencer County, known as King Mine, and we bought several hundred tons. We contracted with a local contractor who had digging and stripping equipment to bring the clay into us, and he brought it in and we tested it, but we rejected it because it was not suitable for our purpose.

81 Q. You could not go ahead with that mine?

A. No, sir. It is still overcovered there.

82 Q. But the mining and hauling, let me understand you, of that particular opening was done by an independent contractor rather than you?

A. Yes, sir.

Mr. Travis: (For Pltf.) That's all.

The Court: Cross-examine.

Cross-examination.

Questions by Mr. Friesen:

83 Q. Mr. Clemens, I hand you what appears to be an income tax return for the Year 1951, fiscal year ending November 30, 1951, and ask you if you recognize that.

A. I do.

84 Q. Do you know if that is the return which your company originally filed?

A. So far as I know it is. There was an amended return [fol. 127] filed and I don't know, but I assume this is the original one.

85 Q. And does that show any deduction for depletion?

A. That I would have to find.

86 Q. I believe it would be on the front page, the line which shows "Depletion," line 26.

A. It shows no deduction on the report.

87 Q. And this was filed February 11, 1952?

A. Yes, sir.

88 Q. Now, at the top of the page, in line 2, "Cost of Goods Sold" shows \$880,649.18, and "Other deductions authorized by law" appears to be \$443,030.39. How do you differentiate these two deductions in terms of what they stand for?

A. I will have to look at the individual schedules, which were prepared by our accountants. (Examining return.) I used to make these out myself but they got too complicated.

89 Q. The \$880,000 figure is the cost of goods sold, isn't it, Mr. Clemens?

A. I assume it is.

90 Q. Would you look on the front and see if you can verify your assumption?

A. Yes, sir.

91 Q. Would that include the cost of mining which Mr. Eugene Clemens has reported at \$93,000?

A. Yes, sir.

92 Q. And when I asked Mr. Eugene Clemens if there was any overhead included in the cost of mining, I believe his answer was it did not appear from the schedule.

A. No, sir.

93 Q. The 443,000 taken from Schedule K, or part of which is taken from Schedule K, a part of which is listed on the face of the return, are other expenses which were [fol. 128] deductible, were they not?

A. Yes, sir.

94 Q. Would you call those generally overhead expenses?

A. Administrative, selling and so on.

95 Q. None of those expenses were allocated to the cost of mining clay, \$93,000, approximately 10 per cent of the \$880,000 figure for cost of goods sold; so, that would indicate that about 10 per cent of the cost of goods sold was the cost of mining. Shouldn't 10 per cent of the overhead administrative expenses, also be attributed to mining?

A. No, sir.

96 Q. Why shouldn't it?

A. There are certain overhead expenses included in that \$93,000 figure. Practically all of the overhead, with the exception of a portion of salaries of executive salaries, is included in that particular item.

97 Q. Well, now, did you ever have any labor problems involving necessity of counsel in connection with your mine?

A. No, sir.

98 Q. Do you ever have to have legal advice on the leases in connection with your operations?

A. Small amount.

99 Q. Wouldn't part of the legal expenses be attributable as well as the officers' salaries?

A. Nominal sum, possibly a Hundred Dollars or Two.

100 Q. Isn't it a fact this mining operation is an essential part of your total operation?

A. Yes, sir.

101 Q. Wouldn't it be just as logical to prorate your administrative and overhead expenses to the cost of mining, as it is to prorate them to any other part of your operation?

[fol. 129] A. We are comparing our mine costs with what we might have to pay if we purchased. If we cut off this mining operation completely and purchased all of our clay, we would not reduce our overhead any.

102 Q. You would agree if the overhead and administrative expenses were prorated, an essential part of your production, that that figure of 10 per cent which is the proration of the costs could increase the cost per ton by some 40 cents a ton, or more, wouldn't it? I am sorry—by 80 cents a ton or more.

A. I don't get that.

103 Q. Well, if you take 10 per cent of the \$443,000, it would be some \$43,000. If you added that to the cost of producing, mining, it would come to some Hundred and Thirty Thousand Dollars which, divided by your 38,000 tons of material, would raise the cost to some Three Dollars and Sixty Cents.

A. If it were added, it would, yes.

104 Q. You have indicated that the Revenue Service has used several different theories in computing your tax. Have you ever known the Revenue Service to make a mistake?

A. I hope they have in this instance.

105 Q. Have you ever made a mistake in referring to the Revenue Service your opinions and beliefs on this percentage depletion?

A. Have we made a mistake?

106 Q. Yes.

A. We filed our original return, based on a different theory, which was denied.

107 Q. And you made a protest, did you not, at one time to the Internal Revenue Service after a 30-day letter was issued?

A. Yes.

(The defendant, for purposes of identification handed the reporter a document, consisting of four pages, for marking [fol. 130] ing and which was by said reporter marked the Government's Exhibit F.)

108 Q. (By Mr. Friesen) I hand, Mr. Clemens, what has been marked for identification the Government's Exhibit F, and ask you if it is your signature appearing on the last page.

A. It is.

109 Q. Did you not state on page 2, of this document having four pages, "that in preparing our amended returns for the years involved and the claims for refund and abatement, we used as a basis for calculating the gross income from our mining operations of shale and fire clay the point in our manufacturing operations at which we first arrive with a commercially marketable product, which is ground fire clay. This product arrives after the raw mineral is crushed and granulated to such extent that by the addition of water it can be made into a mortar for use in laying or setting fire or refractory brick. This ground fire clay has a definite market and an ascertainable market value at any particular time and is the same product from which our end product, sewer tile, is made simply by the addition of water and the necessary baking process."

A. We made that statement, yes, sir.

110 Q. Do you now believe it to be true and accurate?

A. Based on the theory the statement was made, I do not now believe that is correct, because the Courts have held otherwise. In that particular case we based that on the value of the sales, value we received; namely, \$22.00 per ton, or whatever the exact amount was, on the amount of clay to be sold.

Mr. Friesen: (For Deft.) I now offer the Government's Exhibit F into evidence.

(Government's Exhibit F was offered in evidence at this time by Mr. Friesen.)

[fol. 131] Mr. Travis: (For Pltf.) No objection.

The Court. F is admitted, read and exhibited in evidence.

(Government's Exhibit F, consisting of four pages is admitted into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following, to-wit:)

(Here Insert.)

111 Q. (By Mr. Friesen) Mr. Clemens, can you compete with the American Vitriified Products Company in the Chicago market on the sale of sewer pipe?

A. We do up to a certain stage, yes.



112 Q. Does that involve transporting sewer pipe from Cannelton, Indiana, to Chicago, Illinois?

A. Yes, sir.

113 Q. And how are you able to compete if the transportation costs would make your operations unprofitable?

A. For one thing, the American Vitriified Products Company has a higher f.o.b. plant basis than we have at Cannelton; due to the Southern competition we encounter, we have lower f.o.b. plant base. When we come into the Chicago market, we have to absorb a small amount of freight based on current prices to be competitive with them. They have the same situation if they attempt to compete with us in our trade area near our plant; and as the result, in most of the area they do not attempt to compete.

114 Q. Now, then, the testimony indicates that the transportation costs from Cannelton to Brazil is \$4.40 cents a ton. Am I to understand that you absorb that freight rate when you are competing in Chicago?

Mr. Travis: (For Pltf.) Just a minute. The plaintiff objects to the question. There has been no freight rates [fol. 132] introduced on finished products that I am aware of.

Mr. Friesen: (For Deft.) The testimony has been, as I recall, the freight rate would be higher on the finished product, so I was taking the lower figure.

Mr. Travis: (For Pltf.) I repeat: There was no figure given for trucking freight or any other way.

The Court: I have no recollection. I recall you . . .

Mr. Friesen: (Interposing for Deft.) No, your Honor, not on the finished product, but I believe Mr. Clemens testified that the rate would be higher for shipping the finished product than for shipping the crude clay.

Mr. Travis: (For Pltf.) They don't ship by rail freight, in the first place, their finished product.

The Court: As I recall your questioning of Mr. Eugene Clemens on that subject was the cost of handling the finished product more than hauling of clay, and he said, no, it would be about the same, and you brought in the subject of the Chicago market "while you don't ship clay, you ship the finished product"; but you never got into the amount.

Mr. Friesen: (For Deft.) I withdraw my question.

The Court: That is my memory and I stand corrected . . .

115 Q. (Mr. Friesen interposing) Do I understand you absorb the cost of shipping the finished product by truck from Cannelton to Brazil, then, Mr. Clemens?

A. We absorb a part of the costs in that the factory basis that American Vitrified Products Company normally uses in that area, which is pretty much the determining factor on the delivered price, is somewhat higher than our factory basis. So, we take our factory basis, plus our actual trucking cost up there; we absorb a small amount.

[fol. 133] 116 Q. This would be true in a case where there is a producer of sewer pipe between your operation and your market area, isn't that correct?

A. That's correct.

117 Q. So the relative cost or ability to produce from a given clay, a certain product, assuming the clay is of the same kind, would depend also upon where your market for the same of the finished product is, wouldn't it?

A. If I understand you correctly, yes.

118 Q. Mr. Clemens, I believe you told me that you purchased some fire brick from the Huntinburg Brick Company?

A. We have, yes, sir.

119 Q. Referring to these tests which you stated you had run by the State Highway Department, did they ever run a test to determine whether your product consisted of fire clay?

A. No, sir.

120 Q. Did they ever run a test to determine whether your product was refractory?

A. No, sir.

121 Q. The test they run is simply the matter of showing the strength of the material?

A. Crushing strength and absorption.

122 Q. Run a freeze and thaw test?

A. No.

123 Q. They do not. So, the tests they run have nothing to do with whether or not you put fire clay in your product?

A. They do not.

Mr. Friesen: (For Deft.) I have no further questions.

[fol. 134] Redirect examination.

Questions by Mr. Travis:

124 Q. Mr. Clemens, it has been shown on your cross-examination that your company for the fiscal year ended November 30, 1951, used several theories in computing its deduction for depletion. Now, just what was the reason for that?

A. When the law was first passed, I happened to be a member of the depletion committee, of the National Clay Pipe Manufacturers, Inc. We were quite anxious to find out what was the proper theory on which to file our returns. As a member of that committee, I went to Washington and at that time was in a conference with Mr. Williams and Mr. McGinnis, of the Revenue Department. I asked them point-blank what basis should be used for computing the sales' value . . .

Mr. Friesen: (For Deft.) I object, your Honor, on the ground on what he is going to testify to would be hearsay.

Mr. Travis: (For Plff.) It is with your agent.

Mr. Friesen: (For Deft.) I know Mr. Williams very well, and his theories, and I don't think we should have him quoted without a chance to state also what his views are.

The Court: Who is Mr. Williams? An agent of the Government?

Mr. Friesen: (For Deft.) Chief of the Natural Resources Section, of the National Office of the Internal Revenue Service. He has no rule-making power, or anything, other than advisory capacity, and I might add, is often disagreed with by those who do make rules.

Mr. Travis: (For Plff.) The only purpose this will show, your Honor, is no one, including the top resources men, in the Internal Revenue Service knew what basis to use, and [fol. 135] the matter had not been settled until October, 1957, by the Supreme Court of the United States.

Mr. Friesen: (For Deft.) As to brick and tile clay, where there was no market, I will agree; but as to this case, I think it is first impression, and the fact should divide and not bring the mistakes made in the past.

The Court: We might as well make it good and confusing, and let the evidence go in. Finish your answer.

A. (Cont'g) At that time in an informal way—there was no formal ruling requested of any kind—I told them we had sales of a certain amount of ground fire clay in with our general sales; that I did not know the amount; and I said “How would you go about filing your return under the circumstances?” They said, “Well, just go ahead and file it on the basis of taking the price you got for ground fire clay, and make it applicable to the entire production.” They made it very plain it was not official; an official rule and regulation would be issued afterwards. Immediately after, the bill was passed and before anybody had a chance to make up their mind.

125 Q. (By Mr. Travis) At the time your company filed its protest, which Mr. Friesen read from, would you have been willing to settle your depletion question for the fiscal year ending November 30, 1951, with the Revenue Service on that basis?

A. We would have.

126 Q. And did the Revenue Service agree with you?

A. No, sir.

Mr. Travis: (For Pltf.) That's all.

#### Recross-examination.

#### Questions By Mr. Friesen:

127 Q. Referring back to the Revenue Services's theory that has been advanced, you stated that during a couple [fol. 136] of the years they had computed your gross income from mining on the basis of the cost of the processes up through the grinding and screening. Is that correct?

A. That is correct.

128 Q. They also added to that a proportion of profits?

A. That is correct.

129 Q. Which you have not stated previously.

A. Well, I should have; I'm sorry.

130 Q. And that proportion of profits was computed on the basis of your total profit from the entire operation, was it not?

A. Yes, the relative percentage of the profit was, the ground clay cost was of the total profit.

131 Q. Do you know if that was in keeping with the regulation of the Internal Revenue Service then in effect?

A. That was in keeping with their regulation at that time.

Mr. Friesen: (For Deft.) I have no further questions.

Mr. Travis: (For Plt.) Step down.

(Witness Excused.)

The Court: Call your next witness.

Mr. Travis: (For Plt.) If your Honor please, the plaintiff has no more witnesses at this time except the deposition. Does your Honor wish it read in evidence?

The Court: Are there any objections? I believe it should be read.

Mr. Friesen: (For Deft.) I think all of them are made in the body of the deposition.

The Court: The Court will have to rule.

Mr. Travis: (For Plt.) Mr. Friesen and I have discovered quite a number of typographical mistakes and [fol. 137] with the Court's permission—some of them are quite vital—we would like to have the reporter change the deposition in pen as we agree.

The Court: Before I forget, you indicated this is a case of first impression. Are there any other cases pending?

Mr. Friesen: (For Deft.) There is one in Birmingham, Alabama, which has not been tried and is not now set for trial. There is one—There are four or five which have gone through the pleadings stage in both the Northern and Southern Districts of Ohio. There is a ruling in the case on coking coal, by Judge Lynn in the Northern District of Alabama.

The Court: That is not the Birmingham case?

Mr. Friesen: (For Deft.) No. It is a coking coal case. These are all clay cases. Alabama By-Products against the United States is on appeal to the Fifth Circuit by the taxpayer.

The Court: Did the lower court write an opinion?

Mr. Friesen: (For Deft.) Findings of fact and conclusions of law were filed.

Mr. Travis: (For Plt.) I think in that connection it would be well for the Court to know in Louisville, the Court sitting in Louisville, since the Supreme Court de-



cision, and you might say our trading area, Cannelton, the Murray Brick and Tile have prevailed over the Government in their case.

The Court: Are you familiar with that?

Mr. Friesen: (For Deft.) It was on the theory, conceded by the Government, there was no market which may have been erroneous, and in my opinion there have been many concessions by the Government along this line, where there was an actual market based on the policy of the Revenue Service at the time; in this connection I might say investigations of markets in the past have run across [fol. 138] the difficulties which ran across here in finding a well concealed market by leasing and mining arrangements, so that many times we honestly believed there was no market where we might today have been able to prove one.

The Court: All right.

Mr. Travis: (For Pltf.) In the Murray case, the Government filed Notice of Appeal, and later withdrew.

Mr. Friesen: (For Deft.) Which we have done in many cases. We have conceded without even going to trial.

Mr. Travis: (For Pltf.) Do you want to omit the formal introductory part? (Referring to deposition of Dr. Haydn H. Murray).

Mr. Friesen: (For Deft.) The Government agrees to that.

(At this time the deposition of Dr. Haydn H. Murray was read into the record by counsel for plaintiff and counsel for defendant, said deposition, as read, being in the words and figures following, to-wit:)

"HAYDN H. MURRAY, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct examination.

Questions By Howard P. Travis:

1 Q. State your name.

A. Haydn H. Murray.

2 Q. Where do you live?

A. Berkeley Heights, New Jersey.

3 Q. What is your business, Dr. Murray?

A. I am the Director of Applied Research for the Georgia Kaolin Company, Elizabeth, New Jersey.

4 Q. What would you call yourself as a scientist?

A. Clay mineralogist.

[fol. 139] 5 Q. Where were you educated, Doctor?

A. I was educated at the University of Illinois.

6 Q. What degrees did you receive there?

A. Bachelor of Science, Master of Science and Ph.D.

7 Q. When did you get your Doctor of Philosophy degree?

A. 1951.

8 Q. What subject did you major in, if any, at the University of Illinois?

A. I majored in clay mineralogy and minored in mining engineering.

9 Q. What work did you do after you graduated from the University?

A. My first job was as clay mineralogist with the Indiana Geological Survey and associate professor of geology at Indiana University. I left that job last year in February to become the Director of Applied Research with the Georgia Kaolin Company.

10 Q. What engineering societies are you a member of?

A. American Ceramic Society, American Institute of Mining Engineers and the Association of Petroleum Geologists.

11 Q. When you were with the Indiana Geological Survey, from 1950 to 1957, what sort of work did you do?

A. The Indiana Geological Survey in 1950 set up a program to study all of the clay resources in the State of Indiana. I was in charge of that program and visited every ceramic plant in the State of Indiana and sampled all formations that might possibly have a utilization of clay or shale.

12 Q. Have you written articles and prepared maps and other data as a result of your studies?

A. Yes.

13 Q. What is the Indiana Geological Survey?

[fol. 140] A. It is an organization that is a part of Indiana University, controlled by Indiana University to study the natural resources of the State of Indiana.

14 Q. It is really a State organization, isn't it?

A. Part of the State government, yes. The funds come from the Department of Conservation.

15 Q. Yes. So, you are familiar with all of the clay formations and with the products produced from those clays in the State of Indiana?

A. Yes, sir.

16 Q. For all of those years. I will hand you what the reporter has identified as Plaintiff's Exhibit No. 1 and ask you what that is.

A. This is a map showing the location of the clay and shale pits and ceramic plants in Indiana. This work was accomplished by me in 1952.

17 Q. And the "H. H. Murray" in the lower right corner is you, is that right?

A. Yes, sir.

18 Q. The things shown on this map were in existence during 1951, were they?

A. Yes, sir.

19 Q. I will hand you what the reporter has identified as Plaintiff's Exhibit 2, and ask you what that is.

A. This is a map of southwestern Indiana, showing the general out-crop area of the Pennsylvanian bed rock in the State of Indiana.

20 Q. And if you will look at what has been identified as Plaintiff's Exhibit 3, and state what that is.

A. This is a generalized stratigraphic column of Pennsylvanian formations of Allegheny and Pottsville age in west-central Indiana.

21 Q. Where did those pages come from?

A. These pages are Figures 1 and 2 from the Report of Progress No. 11 entitled PENNSYLVANIAN UNDERCLAYS-PO-[fol. 141] TENTIAL BONDING CLAYS FOR USE IN FOUNDRIES by myself, which was published in 1957.

22 Q. Was that in connection with your work for the Geological Survey?

A. Yes, sir.

23 Q. And it was published by them, I suppose.

A. Yes, sir.

24 Q. Are you familiar with the operations of the Cannelton Sewer Pipe Company in the years while you were connected with the survey?

A. Yes, sir.

25 Q. You have been through their plant.

A. Yes, sir.

26 Q. Are you familiar with the clay that they were mining in the years 1951 and 1952?

A. Yes.

27 Q. Have you had samples of those clays in your possession?

A. Yes, sir.

28 Q. And have you run tests on those clays?

A. Yes, sir.

29 Q. Where was that mine that Cannelton was using in 1951?

A. Do you want the exact location?

30 Q. No; approximately.

A. The mine that they were operating in 1951 was south of Highway 237, just a little bit north and east of Cannelton.

31 Q. Within a mile or so of their plant, is that true?

A. Yes, sir.

32 Q. You were in that mine, were you?

A. Yes, sir.

33 Q. What were they taking from that mine?

A. They were taking a fire clay and a shale from beneath [fol. 142] the coal seam which was called the Cannelton Coal.

34 Q. Is that a part of the Pennsylvanian formations that you have testified about?

A. Yes, sir.

35 Q. And is shown on that map?

A. Yes, sir. It is the lowest coal formation in Indiana.

36 Q. That particular point, you mean, where they were mining?

A. Yes, sir.

37 Q. Is there any significance attached to that?

A. Well, in a general way, taking the Pennsylvanian rocks as a whole in the United States, the clays that occur beneath coals which are oldest in the Pennsylvanian system, are more refractory. Now, this is a general statement, but it holds true in Pennsylvania, Ohio, Indiana, Illinois, Missouri and states where most of the refractories are made. We number the coals in Indiana from coal No. 1 through coal No. 8 as our commercial coals; and the most refractory clays occur below coal No. 3. Coal No. 3, which means that the oldest clays are the most refractory.

38 Q. Then would you classify this clay that Cannelton was using as one of the older clays appearing in Indiana?

A. It is the oldest clay that is mined in Indiana, the oldest fire clay that is mined.

39 Q. Now, if you will look at Plaintiff's Exhibit No. 2, state whether or not there are any fire refractory type clays in Indiana other than the Pennsylvanian formations that is shown on that map.

A. There are no refractory clays in Indiana other than those found in the Pennsylvanian rocks in Indiana.

40 Q. Are there any clays in Indiana suitable for making [fol. 143] the type of sewer pipe made by the Cannelton Sewer Pipe Company other than those in the Pennsylvanian formations?

A. No, sir.

41 Q. I will hand you what has been identified as Plaintiff's Exhibits Nos. 4, through 10, inclusive, and ask you to state what those are in their order.

A. Exhibit 4 is a summary of the ceramic tests and sample descriptions of the clay used by the Cannelton Sewer Pipe Company, and this is a summary made by Jack Harrison of the data that I did when I was with the Indiana Geological Survey. Jack Harrison is now the Clay Mineralogist for the Indiana Geological Survey.

42 Q. When was that data accumulated?

A. The samples were accumulated in 1950 as evidenced by the "M" which stands for "Murray." The "50" is for the year, and the "27" is the sample number.

43 Q. Is that the same clay Cannelton Sewer Pipe Company was mining in 1951?

A. Yes.

44 Q. All right, go ahead with the next one.

A. Exhibit 5 is a letter of Mr. Eugene Clemens from me in April, of 1955, giving him a mineralogical analysis of the clay that was being used in the plant.

45 Q. All right.

A. Exhibit 6 is another letter to Mr. Clemens from me in April, of 1955, giving a mineralogical analysis of the shale which occurred below the fire clay in his mine.

Exhibits 7 through 10 are data sheets prepared at the Indiana Geological Survey summarizing the physical tests and mineralogy of samples M5027 and M5030.



46 Q. On the analysis of the clay which was mined what were the P.C.E. numbers on those tests you ran?

[fol. 144] A. The fire clay 5027 was Cone 20. Fire clay sample M5028 was Cone 23. The shale that occurred below the fire clay M5029 was Cone 10. And 5030, also a sample of shale taken at a different location, was Cone 10.

47 Q. On the sheets that you now have in your hand, which are Exhibits 7 through 10, there are notations in pencil on the bottom. Whose handwriting is that, or who made those notations?

A. That is my writing.

48 Q. When was that written on there?

A. This was in 1955. During the Summer of 1955 I revisited every ceramic plant in the State, taking data sheets along with specimens of the shales that I collected in the Summers of 1950 and '51 to show the ceramic people in the State the results of our test on their raw materials.

49 Q. And your handwriting on there was put on there prior to your delivering those to the Cannelton Sewer Pipe Company?

A. I delivered these to Mr. Clemens in his office, and he asked me some questions about them, and I wrote this on there at the time I give it to him.

50 Q. I will hand you what has been identified as Plaintiff's Exhibit No. 11, and ask you what that is.

A. That is a sample of the briquette that we used for testing the fire clay samples that we got from Cannelton Sewer Pipe in 1950. We made up a series of these which we made all these tests on, and this is one example that we took to the plants.

51 Q. And do the figures stamped on those briquettes have any significance in relation to the analyses that you reported to the Cannelton Sewer Pipe Company?

A. The No. 5027 identifies the sample corresponding to the 5027 on the data sheet.

[fol. 145] 52 Q. And the same information is applicable concerning Exhibit 12, which is 5028?

A. Yes.

53 Q. Are those actually fired samples of the clay distinguished from shale, mined by Cannelton Sewer Pipe in 1951?

Mr. Travis: (For Pltf.) May we strike out the word "mined" (referring to original deposition) as it is a duplication and is rep-titious?

Mr. Friesen. (For Deft.) Yes.

The Court: I tell you, suppose we have a few minutes' recess and maybe you can make the corrections. I think our reporter needs a little break at this time.

(Whereupon the Court was recessed at 10:50 a.m., and reconvened at 11:22 a.m., at which time the following proceedings were had:)

Mr. Travis: (For Pltf.) Your Honor, both counsel have agreed, unless the Court wants it read otherwise, we will waive the reporter taking it down.

The Court: All right.

Mr. Friesen: (For Deft.) If there is any argument on a particular ruling, we can have it inserted.

The Court: I leave it to you to call it to the attention of the reporter, so we will have it all.

"53 Q. Are those actually fired samples of the clay distinguished from shale mined by Cannelton Sewer Pipe in 1951?

A. Yes.

54 Q. What was the purpose of the test that you ran that resulted in those particular briquettes?

A. The purpose of these tests was to establish the type of raw materials that were being used for ceramic production in the State of Indiana so that we would have some standards with which to compare the raw materials that we might collect in later years to see how they compared with those that were being used at the present time.

55 Q. From the exhibits which have been just identified, including your analyses, what would you describe that clay as, that particular clay that Cannelton Sewer Pipe was mining?

A. The general term that describes the clays of the Pennsylvanian system is underclay. This is a genetic term which means that it is any clay that is found beneath a coal bed, meaning under the coal, clay designating the type of rock that is found under the coal. So underclay

is a general term that has no economic connotation. Fire clay does have an economic connotation. It refers to material that fires to a non-white color, is high in aluminum silicate, has a kaolinite content, and is refractory. The material that Cannelton was mining in 1951 was definitely a refractory clay.

56 Q. Fire clay?

A. So it would be called a fire clay.

57 Q. In your travels through these mines and plants located throughout southwestern Indiana, and your conversations with producers of various ceramic production, did you also familiarize yourself somewhat with the economic situation in regard to the use of clays for actual production?

A. Yes, sir.

58 Q. Considering the locations of the plant of Cannelton Sewer Pipe Company, would it have been economically feasible for them to have purchased clay other than within a very short radius of the city of Cannelton and to be used in their production?

A. No, sir. Most structural clay production is a relatively low-priced commodity and, therefore, the cost of the raw material has to be very low. The clay that can be used for sewer pipe in the State of Indiana is all in the western and southwestern part of the State. The [fol. 147] nearest sewer pipe plant to Cannelton in the State of Indiana is at Brazil, Indiana, and it is not economical to ship further than approximately, oh, I would say, 20 to 30 miles to make a product of this type.

59 Q. Are there any other plants in the extreme portion of southern Indiana that are making vitrified products?

A. None that are making sewer pipe, no.

60 Q. Where is the nearest plant to Cannelton using your map if you wish as a guide, which uses and must use fire clay?

A. The nearest plant that must use fire clay for one of their products is Huntingburg.

61 Q. What product is that?

A. They make a low-duty fire brick. This was in 1951. I can not speak for the present.

62 Q. Yes, that is what we are talking about.

Now, would it have been economically feasible, in your opinion, for the Cannelton Sewer Pipe Company to have purchased clay in Huntingburg and haul it to Cannelton?

A. No, sir. The distance would be too great. It was underground mining so the cost of mining would also be prohibitive.

63 Q. Assuming they could have purchased fire clay in Huntingburg at \$3.25 per ton, would it have been economically feasible for them to have purchased that fire clay in Huntingburg and hauled it to Cannelton?

A. This would be my opinion, but I would say no.

64 Q. Then how about Brazil? Would it have been economically feasible for them to have purchased fire clay in Brazil and hauled it to Cannelton?

A. Definitely not.

65 Q. Do you have any knowledge of any sales of fire clay in the extreme southwestern portion of Indiana?

[101. 148] A. Huntingburg Brick Company bought fire clay from the Uhl Pottery Company which is now Louisville Pottery, I believe—I am not sure of the year, in 1951 or 1952, though, they bought a little bit because they were running into trouble in their own mine. The Uhl Pottery was also located in Huntingburg. That is the only fire clay that was sold in Indiana, to my knowledge, in that southern part of the State. That excludes the Brazil area, of course.

66 Q. Yes. Are you also familiar with the plants using clay which are in the immediate vicinity of Cannelton and across the river in Kentucky?

A. Yes, to some degree.

67 Q. Is that the same Pennsylvanian formation that has some outcroppings in Kentucky, too?

A. Well, the same outcroppings are across the river at Hawesville, but the clays that are being mined at the present time in Kentucky are of a younger age than those mined by the Cannelton Sewer Pipe Company in 1951. They are not the same formations.

68 Q. Can any clay be made into sewer pipe?

A. No, sir.

69 Q. Is there considerable testing and research necessary on various clays before it can be determined whether it is suitable for making sewer pipe?

A. Yes. To make a good sewer-pipe product, you have to have a mixture that will mature at the correct temperature of firing. You have to have the right plasticity conditions, shrinkage conditions and a different research project has to be set up for each size. There are different problems concerned with making a small size pipe, from, say, an 18 or 24-inch pipe. So, there is considerable research and study that has to be done before you can put a clay into production.

70 Q. Just to get it in the record, P.C.E. means "pyrometric cone equivalent," does it not?

[fol. 149] A. That is right.

71 Q. What does that mean?

A. That is a set of standards that is used by the A.S.T.M. to determine the maturing or fusion temperatures of a clay body. These cones are made up with different mineral constituents, and they will melt at certain prescribed or definite temperatures which are standardized, and the higher the cone number, the higher refractoriness of the cone.

72 Q. What would be your own personal definition of a fire clay in relation to P.C.E. requirements?

Mr. Friesen: I object to this question on the grounds that this gentleman's personal definition has no relationship to the case concerning the generally understood commercial meaning of the term which relates to our problem."

Mr. Friesen: (For Pltf.) I withdraw the objection on the basis of the answer that was given.

The Court: Show the objection overruled. You may answer.

73 Q. Go ahead and answer.

A. The definition of a fire clay taken from Norton Refractories Book, Second Edition, in 1949, is that a fire clay is a material that will withstand temperatures above Cone 19. Now, there are other definitions that you will find in ceramic text books and the latest one I can cite is a recent publication by the Bureau of Mines in California where they used 2600 Fahrenheit as the refractory temperature. Now, this would be about Cone 15. So, there are some discrepancies in the exact cone



value in regard to what is a refractory material. But it is on the order of 2600° Fahrenheit and above. Cone 19 is 2740° Fahrenheit.

74 Q. And the clays which Cannelton Sewer Pipe was using in 1951, and which you analyzed, would qualify [fol. 150] as a fire clay under any of the definitions you have just referred to, would it not?

A. Yes.

75 Q. I will hand you what I would call a piece of rock and ask you what that is.

A. That is a piece of shale as shown by its laminated character. That is all you can say about it. It is shale.

76 Q. That is a piece of shale?

A. Yes, sir.

77 Q. What is this second one that I am handing to you?

A. This is an underclay, as shown by the texture. It has no laminated character, and also by the fact that it has these little rootlets or organic remains that extend down into the clay, this is what we call an underclay.

78 Q. You can not tell by looking at that piece of underclay whether you would call it a fire clay or not, can you?

A. No, sir. The only way you could tell, you would have to know something about the geology, the formation from which it was taken and the location. That is a matter of experience. You can't tell just by looking.

79 Q. If I told you that piece you are holding came from the mine which Cannelton was operating in 1951, could you then, knowing the geological formations, say whether it is a fire clay or not?

A. If I knew that it came from below the Cannelton coal in Indiana, I could say that it was a fire clay.

Mr. Travis: That is all.

Mr. Friesen: Mr. Travis, are you offering these exhibits that you have numbered and identified?

Mr. Travis: Oh, yes, I will.

(Mr. Friesen: I object to the admission of any and all of these in evidence until and unless it is established that they relate to the year 1951. As I recall, the tests were [fol. 151] all made from 1950, and some of them were made in 1955. If it is determined that those years are

relevant in determining the quality aspects of the material used in this case, then I will withdraw my objection.

Mr. Travis: Well, I thought that I had that cleared up as we went along, but let me ask one blanket question.

80 Q. The exhibits, Dr. Murray, that have been marked and which are analyses or letters written by you concerning the Cannelton clay, were those analyses made from samples similar to the clay being mined by Cannelton Sewer Pipe in 1951?

A. Yes, sir. The samples numbered M5027 through M5030 were collected by me personally from the mine of the Cannelton Sewer Pipe Company. We collected, during the Summer of 1950, a total of approximately 250 samples so that physical tests and mineralogical tests that were made on these samples took approximately three years to complete. Therefore, the data that was accumulated on the samples that were collected during this period, some was done in 1953, and finished in 1954.

Mr. Friesen: When were the samples collected? All of them were collected in 1950, weren't they?

The Witness: The particular ones at Cannelton were collected in 1950.

Mr. Friesen: So that any of the data that you arrived at in the next three years, referred to samples collected in 1950?

The Witness: In the Cannelton area, yes.

Mr. Travis: Plaintiff now offers in evidence Plaintiff's Exhibits 1 through 12, inclusive.

The Court: Any objection?

Mr. Friesen: (For Deft.) I renew my objection, your Honor. The relevancy of tests taken in 1950 and 1956 to [fol. 152] the problem, the Government would assert that, like a market, the quality of the clay may vary slightly over the years, and that information relative to a market as well as information relative to the type of clays in 1950, or 1952, or '3 would also be admissible and relevant; and I made by objection so as to preserve the point that I am making with reference to other data.

The Court: As I recall we have evidence in the record from the two Clemens that the product has remained consistent since its manufacture.

Mr. Travis: (For Phtf.) Until they closed the mine. As I understand, that is in the record. It is further brought out by Dr. Murray there is no significant difference in the clays from year to year taken from this mine.

The Court: Is it already in here?

Mr. Travis: (For Phtf.) No; part of the cross-examination.

The Court: I would overrule the objection. I think there is sufficient connecting evidence that the product is generally the same. So, show the admission into evidence of Exhibits 1 through 12, as admitted, read and exhibited in evidence.

(Plaintiff's Exhibits 1 through 12, inclusive, are admitted and read into the evidence, and made a part of the record in this case, said exhibits being in the words and figures following, to-wit:)

(Here Insert.)

"Mr. Travis: You may cross-examine.

Cross-examination.

Questions by Ernest C. Friesen, Jr.

81 Q. Dr. Murray, are clay deposits uniform in their constituency throughout the deposit?

A. No, sir.

[fol. 153] 82 Q. Will they vary in chemical content and physical structure of both laterally and vertically?

A. It depends on how far you want to extend that. The underclay, itself, will vary with depth. But over a distance of two to three feet below the coal, you will have pretty constant results.

83 Q. Then two or three feet below the coal, you will have pretty constant results?

A. Yes, sir. That is, in Indiana.

84 Q. If this clay, then, were six feet thick, not including any shale, then you might get a greater variation below the first three feet, is that correct?

A. It is possible. It, again, depends on the deposition. I have seen deposits that are essentially homiogeneous

as much as nine feet thick in Indiana. Others, I have seen them change in one foot.

85 Q. How many samples did you take at Cannelton in 1950 of the clay material?

A. You are excluding shale?

86 Q. Yes.

A. Two.

87 Q. You took two samples. How did you take those samples?

A. I took the samples on the basis of the lithologic character, that is, the character you could see, a difference visually.

88 Q. Did you use a particular method of taking your samples, such as channeling, or something like that?

A. I used a channeling method and channeled the sample on a piece of canvas and quartered the sample to get a representative sample of the material.

89 Q. Do you recall the height of the face from which you took the channel?

A. May I look at the sheet here?

90 Q. Certainly.

[fol. 154] A. Sample 5027 was a composite of the upper one foot of fire clay from the Cannelton mine.

91 Q. That tends to be more pure than the clays as they get deeper under the coal seam, is that correct?

A. You can't say that as a generalization.

92 Q. But it does occur that way, is that correct?

A. It can, or it does not necessarily.

93 Q. And the second sample, according to Plaintiff's Exhibit No. 2—

A. (Interposing) 5028 is the next four feet. In other words, it would be the interval from two feet to six feet below the coal.

94 Q. Those are the only two samples that you took out of the Cannelton clay on which you have made an analysis?

A. No, sir.

95 Q. What other samples did you personally take?

A. In 1952, I collected a 50-pound sample from the mine which was north of Highway 237 and used it in the Report of Progress No. 11 on Bonding Clays. And, then, in—

96 Q. (Interposing) Excuse me. That was from a different mine than the one you took in 1950, a different opening into the ground?

A. Yes, sir. In 1952, the Cannelton Sewer Pipe closed the mine I collected the original samples from. They had opened a new mine north of that locality. It was in the same formations and the characteristics of the clay were much the same. Then in 1955 or 1956, I don't remember the exact time, it was in the winter, Jack Harrison, the present Clay Mineralogist who was a student of mine, and I—at Indiana—collected additional samples at the Cannelton mine and made tests on them.

97 Q. Now, if between the time that you took that sample in 1950 and the beginning of the taxable year [fol. 155] that we have here in suit, they removed 30,000 tons of clay from the working face, would you expect to find a variation in testing of a sample?

A. In this particular type of geologic formations I would not expect a significant change in physical and mineralogical properties.

98 Q. What do you mean by a "significant change"?

A. I mean a radical change in shrinkage, in P.C.E. values.

99 Q. Would you refer to a change in kaolin content of five per cent, would you consider that to be a significant change?

A. No.

100 Q. Would the change in the free silicon content of two or three percent be a significant change?

A. No, not in this particular use. I might say that the underclays are more homogeneous in their use laterally than shales, for example. The characteristics of the geological conditions under which these materials were formed, make it such that underclays, in general, tend to be more homogeneous than the adjacent geologic formations, because it is an old soil and you are leaching the alkalies and the alkaline earth materials from the clay during weathering, so that they tend to be more homogeneous than shales, for example.

101 Q. Now, we have discussed significant differences between the clays in the time period that would elapse between the tax year and the time you took your samples. Would there be a significant difference between the clays



taken from the Cannelton underclay and the clays sold at Brazil, Indiana, for sewer-pipe clay?

A. I would like to clarify that question. You are asking me if there is a difference in properties and mineralogy?

[fol. 156] 102 Q. A significant difference for use in making sewer pipe.

A. I don't have the data right at hand, so I have to think a little bit on this one. The State Highway Department maintains a testing laboratory at Purdue University where they test sewer pipe that is used by the State Highway. The Cannelton Sewer Pipe, in the history of the postwar years, has had the best sewer pipe that is made in Indiana. The absorption is low; it tends to be more uniform. So on that basis, I would say that the raw material at Cannelton for use as sewer pipe is slightly better than that at Brazil.

103 Q. Would you call that a significant difference in the material, or could that be due to manufacturing processes and know-how?

A. In part it is due to both.

104 Q. Are you willing to state that the material in the Brazil area and the Bloomingdale area are not satisfactory for use in making good vitrified sewer pipe?

A. No, sir.

105 Q. That would be satisfactory for use in making good vitrified sewer pipe?

A. Yes, sir.

106 Q. Do you know the transportation costs from Brazil, Indiana, to Cannelton, Indiana?

A. No, sir.

107 Q. You stated awhile ago that you could pass on an economic opinion as to whether or not it would be profitable to bring clay from Brazil, Indiana, to Cannelton, Indiana.

A. I was answering a question in a specific sense. I don't know the cost of the transportation of this item from Brazil to Cannelton. I know that you can not transport raw materials any great distance and that the transportation costs from Brazil to Cannelton would definitely be too great to make it profitable.

108 Q. Do you know how much it would cost, approximately, even? You are passing an opinion based on a cost. Do you have any idea of what it costs?

A. This is by truck?

109 Q. By the most economical method. I assume there is rail transportation.

A. You wouldn't get rail transportation, because you would have to switch too much, so it would have to be by truck. It would be on the order of \$5.00 a ton.

110 Q. To transport it 150 miles?

A. Right.

111 Q. Do you know if rail transportation would be that high?

A. It would depend upon the rates.

112 Q. Do you know if rail transportation is normally that high, \$5.00 a ton?

A. I can only speak on the basis of Georgia Kaolin Company. I can't give you any idea on the rates in Indiana.

113 Q. If it costs \$3.50 a ton to extract the clay from their underground mine in 1951, would it still be your opinion that it would be uneconomical for them to buy clay from the Huntingburg area, to Cannelton?

A. I don't think this question—

114 Q. (Interposing) Would you just answer the question, Doctor?

A. I will say no, it would not be.

115 Q. It would be uneconomical?

A. Yes.

116 Q. It would cost them more than \$5.00 a ton to get clay from Huntingburg to Cannelton?

A. No; the transportation cost would not be that high.

[fol. 158] 117 Q. Do you know at what price clay sold in the Brazil area in 1951?

A. Well, this will have to be a qualified statement. As I remember, the costs were about \$1.80 a ton. I don't want to state that as a positive statement, because that price changes so rapidly, and I don't remember that that was an absolute figure.

118 Q. You stated you had some familiarity with the Kentucky production of ceramics. Are you familiar with the work of the Owensboro Sewer Pipe Company?

A. I am not familiar with it. I know just in a general way what they used, and where they got their clay from, but I am not familiar with their plant.

119 Q. Where did they get their clay from?

A. From the vicinity of Hawesville, Kentucky.

120 Q. Do you know whether this material was satisfactory for making commercial sewer pipe?

A. It apparently was.

121 Q. Do you know how far Hawesville is from Cannelton?

A. It's just across the river, about a half a mile.

122 Q. And it is about 12 miles from Owensboro, then?

A. Yes.

123 Q. So, when you stated that the closest sewer-pipe clay to the Cannelton area in Indiana was the Huntingburg area, you, of course, didn't mean that?

A. Sewer pipe is made at Brazil; not Huntingburg.

124 Q. The closest place they make sewer pipe is Brazil?

A. Yes. I was not including any other state just Indiana.

125 Q. Did you realize that they were making it in Kentucky, just a few miles from Cannelton?

A. About 15 miles, yes.

[fol. 159] 126 Q. Did you know if this is a satisfactory sewer pipe that they make in Owensboro?

A. I can not state that. I have no basis of knowing what the tests were. I have never tested their material.

127 Q. Is there a significant difference for the purpose of making sewer pipe between the clay mined at Cannelton in 1951 and the clay which they are now taking from the Kentucky side of the Ohio River?

A. That I can not answer, because I haven't tested the clays that they are now using.

128 Q. You know that they are now making sewer pipe from those clays?

A. I know that they are, yes.

129 Q. Going back to your definition of fire clay, how would you disagree with the American Society for Testing Materials', which you have referred to as A.S.T.M., definition of fire clay?

A. I would have to see the definition. I don't remember what it is.

130 Q. This is my penciled copy of the definition taken from the Manual of A.S.T.M. Standards on Refractory Materials, Page 129, A.S.T.M. C 71-51, which was revised in 1951.

A. It is a very general definition, but I would say it is essentially correct.

131 Q. So that when it states that fire clay is an earthy or stony mineral aggregate which has as the essential constituent hydrous silicates of aluminum with or without free silica, plastic when sufficiently pulverized and wetted, rigid when subsequently dried, and of suitable refractoriness for use in commercial refractory products, you would agree with that definition?

A. Yes.

132 Q. So any material which was not of suitable refractoriness for use in commercial refractory production, would not be a fire clay?

[fol. 160] A. State that again.

133 Q. Any clay which was not of suitable refractoriness in use of commercial refractory products would not be a fire clay?

A. Any material that could not be used—

134 Q. (Interposing) To make commercial refractories.

A. No. Any material that could not be used for a refractory.

135 Q. Now, you agree with the words "commercial refractory" in this definition, do you not?

A. Yes.

136 Q. So, your difference is one that doesn't relate to the commercial world; it relates to your definition as a clay mineralogist?

A. Any material that has a refractoriness, we'll say it will withstand temperatures of 2600° Fahrenheit, will make a refractory, a low-grade refractory provided it has these other properties.

137 Q. It is suitable for commercial refractories, then, wouldn't it be?

A. Yes.

138 Q. If it had what other properties?

A. The looseness and the composition of hydrous silicates.

139 Q. Do you know if they make any refractories at Cannelton Sewer Pipe Company?

A. I do not know. To my knowledge, they do not. But I can not state that definitely.

140 Q. Are there other things other than pyrometric cone

equivalent, other than material, that would make a suitable refractory? The fluxing quality of the material would have something to do with it, wouldn't it?

A. Yes. There are many other factors, but the essential [fol. 161] ingredient, the one most desired is the pyrometric cone equivalent.

141 Q. That is the point from which ceramic engineers begin?

A. Right.

142 Q. But they do look at other things, whether or not they can use as a refractory?

A. Yes.

143 Q. And if this material wasn't being used, or hadn't been used, you wouldn't have a satisfactory test, then, as to whether or not it was used satisfactorily?

A. On the basis of the work we did as the Indiana Geological Survey, it would be suitable to make a low-duty fire brick.

144 Q. Is that based on the cone equivalent?

A. On shrinkage, pyrometric cone equivalent, plasticity.

145 Q. What other requirements of a low-duty refractory is there, as you have termed it in terms of pyrometric cone equivalent?

A. The definition of a low-duty refractory material is that which will withstand temperatures between—pyrometric cone equivalent of 19 is the lowest.

146 Q. Nineteen is the lowest?

A. Yes.

147 Q. If some of them went below 19 in the test, would you say it wouldn't be suitable for low-duty refractory?

A. Of what?

148 Q. The clay samples taken from the Cannelton mine, if they went below 19, would you say they were suitable for refractory purposes, for low-duty refractory?

A. No. I would have to know what the sample was and how it was taken, because by proper blending, they can utilize the materials.

[fol. 162] 149 Q. Do you mean blending with higher-grade materials? Is that correct?

A. Right.

150 Q. But the material, itself, would not be a refractory suitable for use in making a low-duty refractory?



A. Only on the definition that Norton gave. There are other definitions that say 2600 or Cone 15. You will notice on A. S. T. M. they give no temperature minimum.

151 Q. Do you know if the A. S. T. M. has ever taken a position on pyrometric cone equivalence for a low-duty refractory?

A. I do not.

152 Q. If the A. S. T. M. had always used the pyrometric cone equivalent of 19, would that tend to make you think that the commercially understood meaning of the term would include only those which have a P. C. E. of 49?

A. Not necessarily, because there are a number of authorities who have written text books and other material about refractories that have used Cone 15 or 2600° Fahrenheit.

153 Q. What refractory uses can you use a Cone 15 refractory clay?

A. Well, it would be a low-duty fire brick that can be used for lining furnaces.

154 Q. Have you ever known of any example where low-duty fire brick has gone as low as 19 in pyrometric cone equivalent?

A. As low as 19?

155 Q. As low as 15 in P. C. E., lining a furnace?

A. I have no personal experience from which to draw on to answer that question.

156 Q. You don't know?

A. I don't know personally. There must be because of the literature.

[fol. 163] 157 Q. Could the literature be based upon the determination that ladle brick may be necessarily of a low pyrometric cone equivalent, or are you familiar with the use of ladle brick and how it is applied?

A. Yes, in a general way.

158 Q. It must flow in order to close up the crack, isn't that correct?

A. I don't know, I can't answer that question. There are no ladle brick, as such, made in Indiana.

159 Q. Do you know if the Bruce Williams Laboratory is a reliable organization, from your experience, located at Joplin, Missouri?

A. I am not familiar with the organization.

160 Q. I hand you what has been furnished the Government by the taxpayers, a copy of an analysis made by the Bruce Williams Laboratory, and ask if you can testify that as to whether considering all the facts on that page, that material would be used in making a low-duty refractory brick?

A. Based on some definitions, it could be.

161 Q. A low-duty refractory brick?

A. Yes.

162 Q. Not rather than a ladle brick?

A. I can't answer that, because I don't know. Another thing, you would have to know if this were a composite of the whole face that included the lower one foot of shale in this mine, then, of course, your refractoriness would be down to Cone 17. If it were the fire clay, as such, our experience has shown it's above Cone 19.

163 Q. If the miner mined the material indiscriminately, taking the shale and clay together, and the shale was a pyrometric cone of 10, as indicated in your test, would the product, that which is removed from the mine without differentiation, be fire clay?

[for 164] A. I can't answer that specifically, because you will be in a ratio of approximately six to one, the mixture, and I don't know how much the shale would take it down, would take the pyrometric cone equivalent down.

164 Q. If it was 40 cent shale and 60 per cent fire clay, could you say how much it would take the pyrometric cone down?

A. I can not.

165 Q. It would depend upon individual test of the material, is that correct?

A. Right. The fire clay, as such, would be fire clay. The shale would be shale. That's all I can say about it.

166 Q. You recognize a distinguished difference between the two?

A. Yes, sir.

167 Q. And they are terms of art which refer to specific types of formations in the ground?

A. Yes, sir; the shale. Fire clay is an economic term. Underclay is the general term for clays that occur under coal. Fire clay is an economic term. It has no genetic significance.

168 Q. Going back to the economic aspects of hauling clay, are you familiar with the Louisville Pottery Company?

A. I am familiar with their mine at Huntingburg. I have never been in the Louisville Pottery Company.

169 Q. They have a mine at Huntingburg?

A. They did have a mine at Huntingburg.

170 Q. In 1951, do you know whether they had a mine in Huntingburg?

A. Well, I believe the Uhl Pottery Company was operating that at that time. After that, Louisville took over. I don't remember specifically whether Louisville had a mine there in 1951 or not.

[fol. 165] 171 Q. Do you know how far Louisville is from Huntingburg, approximately?

A. Oh, approximately 60 to 65 miles.

172 Q. Did you know that they took the clay from Huntingburg into Louisville?

A. Yes, sir.

173 Q. Do you know if this clay that was being taken from Huntingburg to Louisville was significantly different than the clay that is mined at Cannelton for the purpose of making a sewer-pipe product?

A. It has a different end use, your pottery being a more expensive material. They can afford to have a higher cost of raw material under those arrangements. The material, as such, is the material that they use for a low-duty fire brick at Huntingburg. The Huntingburg Brick Company uses the same clay to make their low-duty fire brick.

174 Q. Your determinations as to whether it would be economically feasible would depend, then, on whether they could make sufficient profit to absorb that cost?

A. That is the case in every raw material that is used.

175 Q. So, if at Cannelton they could make sufficient profit to absorb the cost of clay from Huntingburg or Brazil, then your testimony would change and you would say that it would be economically feasible?

A. Every clay operation in this country is based on economics and transportation today, and is a significant factor, clay being a low-priced commodity, as such. You have to consider transportation.

176 Q. I hand you, Dr. Murray, what the reporter has marked for identification Government's Exhibit A, entitled DIRECTORY OF PRODUCERS AND CONSUMERS OF CLAY AND SHALE IN INDIANA by the Indiana Department of Conservation, [fol. 166] GEOLOGICAL SURVEY, Directory No. 3, dated 1955. I assume you are familiar with this pamphlet.

A. Yes.

177 Q. From what source did you get the information that is reported as to the individual producers?

A. This information was collected from either the owner, general manager, or the superintendent of each operator listed in here.

178 Q. Did you go to the plant in each case?

A. I did.

179 Q. Do you believe the information there to be correct in all respects?

A. It is correct so far as the information that they gave me. I reproduced the information that was given to me.

180 Q. When you have listed a pit location, you know that there was a pit located there, is that correct?

A. There was a pit located there.

181 Q. And when you state in this publication that there were purchases of underclay from the Brazil Area, you know that they were purchasing underclay?

A. At the time that I visited the operation, based on their word, yes.

182 Q. During what period of time did you compile this?

A. The information was first collected in the summer of 1950 and rechecked in 1954. This was published in 1955.

183. Q. I don't want to ask you about all of these, but I would like to ask you about specific ones.

Do you recall in the process of preparing this that there were a number of producers who mined clay and shale only for sale in that they did not produce ceramic products from clay and shale?

A. There are relatively few in Indiana, but there are some.

[fol. 167] 184 Q. Would the Big Bend Collieries at Brazil be one of those?

A. They were at the time. They are defunct now.

185 Q. Do you know if they were in existence in 1954?

A. They were.

186 Q. And it says a capacity of 5000 to 6000 tons per month. That doesn't refer to production; that refers to capacity?

A. That is capacity. They could produce that in an optimum month. They didn't operate some months.

187 Q. Do you know that they were producing clay and shale for sale in 1951?

A. Yes, sir.

188 Q. Would the Brown Coal Company, of Centerpoint, in Clay County, be another one of those producers?

A. Yes.

189 Q. Do you know if they were producing in 1951?

A. I don't believe they were producing in 1951. They started in about 1953.

190 Q. Producing clay for sale?

A. All these coal companies, their prime objective is to sell coal, but when they strip off the coal, the clay is laid bare, so that they can just increase their profits if they can remove the clay at the same time they remove the coal. Many times they will leave the clay lie there, because there is no market for it. There are a number of coal producers in the Brazil area, as you probably know, so that there isn't a market for all of the clay that could be produced.

191 Q. Well, it states that they purchased underlays of coals near Bloomingdale. That particular producer was purchasing these underlays that these coal companies and other people were selling, is that correct?

[fol. 168] A. That is right.

192 Q. Are you familiar with the Bureau of Mines Minerals Year Book, and the way they accumulate the figures for those?

A. In a general way, yes.

193 Q. Do you know how they accumulate the figures on clay?

A. From Indiana?

194 Q. Yes.

A. They use a mineral statistician at the Indiana Geological Survey from which they get their data.

195 Q. Do you know where he gets his data?

A. From the individual producers.

196 Q. If the producers tell that statistician that he is



purchasing his clay in a certain amount, he would take that figure as correct?

A. Yes, sir.

197 Q. And if he called his clay a "fire clay," it would go into the category of a fire clay in those publications?

A. The person who takes in the data is not geologically or ceramically trained. It is a girl, and all she does is act as an intermediary between the producers and the Bureau of Mines.

198 Q. And if I told you that during 1951 some 300,000 tons of fire clay were sold in the State of Indiana, rather than used by producers in the State of Indiana, would you think, in your experience, that that figure was substantially correct?

A. In Indiana, it probably is, because 99 per cent of the clay that is sold is in the Brazil area.

199 Q. Would you think the figure would be correct, or does your experience indicate that it would be reasonably correct?

A. Yes.

[fol. 169] 200 Q. Now, how far is Bloomingdale from Brazil?

A. It is 20 or 25 miles.

201 Q. Do you know that they also produce clay and shale for sale in that area?

A. There is a clay pit at Bloomingdale.

202 Q. Do you know if they sell clay in the crude form from that pit?

A. Yes, they do.

203 Q. Now, at Bloomingdale, Brazil, Huntingburg, and Cannelton, they are all in the Pennsylvanian formation?

A. Right.

204 Q. And the clays that are mined in those areas all come from the Pennsylvania formations?

A. Yes.

205 Q. Different parts of those formations?

A. Yes.

206 Q. Do you believe the information contained in this Directory No. 3, prepared by you, to be substantially correct?

A. As of the date of preparation, based on the information that was given to me, yes."

Mr. Friesen: (For Deft.) I will have to have this copy marked Government's Exhibit A. I can't find the one originally marked.

(The defendant, for purposes of identification, handed the reporter a certain document for marking, and which was by said reporter marked Government's Exhibit A.)

"Mr. Friesen: I offer in evidence Government's Exhibit A.

Mr. Travis: No objection."

The Court: There being no objection, Government's Exhibit A is admitted, read, and exhibited in evidence.

[fol. 170] (Government's Exhibit A is admitted and read into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following, to wit:)

(Here Insert.)

Mr. Friesen: (For Deft.) Government's Exhibit A is a directory, and you will notice they list where each producer purchased and from the source he was purchasing, and includes—I have underlined two or three, perhaps as many as 10, in red pencil. Those interlineations are my own, and, of course, were not in it. The interlineations, one in particular, shows the American Art Clay Company, Inc. purchased Minshall underclay from Huntingburg, and used as well imported domestic clays.

The Court: You may proceed.

207 Q. Dr. Murray, you have prepared another pamphlet, PENNSYLVANIAN UNDERCLAYS—POTENTIAL BONDING CLAYS FOR USE IN FOUNDRIES.

A. Yes.

208 Q. And in the process of writing that paper, you examined Cannelton clay from their mine, is that correct?

A. Yes.

209 Q. Did you find it to be what you would recommend as bonding clay for use in foundries?

A. No.

210 Q. Would you consider that to be a refractory clay?

A. No. That is based on the fact that the largest tonnage of foundry clay is bentonite, which is not refractory in any sense of the word.

211 Q. Does it need to be resisted to high temperatures? [fol. 171] A. Not necessarily, because you use such a small amount of clay. Your silica content of the mold absorbs most of it. All you need is a bond between the silica and the bentonite. You just use two to five per cent, approximately, to bond these molds.

212 Q. Do you recall why this particular material was not satisfactory, and the specifications?

A. The green strength was too low to be used as a satisfactory bonding material. The one important aspect of foundry clay is that it has to have a high green strength; that is, so it will retain the shape in which you mold it, and this material from the Cannelton area had a low green strength.

213 Q. When you refer to "underclays," do you always mean it actually came from underneath the coal seam?

A. In some cases the coal had been eroded away or removed. There are inconformities in the rocks where there has been a previous history of no deposition, and in those cases, the coal has been removed, so we know coal had to be there at one time because the underclay is the material in which the vegetation grew to form the coal. But as we see it now, it does not necessarily mean the coal has to be there at the present time.

214 Q. You testified that fire clay is not a term of mineralogical designation, but a commercial term.

A. I didn't say mineralogical; I said genetic, so far as origin is concerned. Mineralogically, it has a certain connotation, because the results of physical tests are all based on the original mineralogy.

215 Q. Would you say that all fire clays are underclays?

A. No.

216 Q. Would you say that all underclays are fire clays?

A. No.

[fol. 172] 217 Q. So they are not synonymous terms in any sense?

A. No.

218 Q. You would disagree with anyone who said they were?

A. Yes.

Mr. Friesen: I have no further questions at this time.

### Redirect examination.

#### Questions By Howard P. Travis:

219 Q. Dr. Murray, the two mines that you have visited of the Cannelton Sewer Pipe Company were right across the road from each other, is that correct, or substantially?

A. Substantially.

220 Q. They were the same vein of clay, were they?

A. Yes, they were both the Cannelton clay.

211 Q. When the various tests that you have made in different years, has there been any significant variations in those?

A. Not between those two mines.

222 Q. Doctor, sewer pipe, as such, produced by the Cannelton Sewer Pipe Company, is not a refractory product, is it?

A. No.

Mr. Travis: That is all.

### Recross-examination.

#### Questions By Ernest C. Friesen, Jr.:

223 Q. Then you say that there no significant variations between the two mines. There were variations, I assume, between the two mines, were there not?

A. There are variations, if you want to take it on a fine [fol. 173] scale, but over-all working properties in the plant production scheme are not significantly different. It didn't alter the properties of the sewer pipe when they went from one mine to another.

224 Q. In 1954, one test showed an  $\text{SiO}_2$  of 63.21, and another test made six months earlier showed an  $\text{SiO}_2$  of 69.75. Would you call that a significant variation?

A. I can't say, because the  $\text{SiO}_2$  doesn't tell you what the mineralogy of the material was. You see, one of those could have more free quartz, or more kaolinite, which would have a high silica ratio. It would depend entirely on the way the silica was combined in the mineral. Chemical analyses are dangerous things to base properties on.

225 Q. How would you distinguish properties, then, in determining whether there was a significant difference?

A. I don't believe I quite understand.

226 Q. You said that a chemical analysis is not a satisfactory basis for the determination. What is?

A. Chemical analysis alone is not a satisfactory basis for determining resultant physical properties. Mineralogical analysis and a few physical tests are always needed in raw materials.

227 Q. Mineralogical data that you would like to know about. Would that be a percentage of kaolinite?

A. Kaolinite and other minerals that might be in there. You see, the clays themselves have different properties. Kaolinite is an entirely different property than Montmorillonite, so that mineralogy is a very important factor. The silica content of Montmorillonite is higher than that of kaolinite.

228 Q. If there was a variation of five per cent in the kaolinite content from one sample to another, would you [fol. 174] consider it to be significant for purposes of making sewer pipe?

A. No.

229 Q. If there was a variation of as much as two per cent in the fluxing ingredient, would you consider it to be significant for the purpose in making sewer pipe?

A. Well, of course, there is a critical value, so that it would depend where you are in relation to this critical value, and I don't know what that critical value is.

230 Q. What are the fluxing agents generally found in Pennsylvanian clays?

A. Well, there are minor quantities of calcium carbonate in some very small amounts. There are small amounts of this mineral Montmorillonite that I mentioned which vitrifies at low temperature, iron compounds—there are many.

231 Q. You might find some magnesium carbonates, too?

A. Yes. There might be a possibility of finding a small amount of dolomite which is a calcium magnesium carbonate.

232 Q. There is some potassium oxides, too, is there not?

A. Not oxides, as such. The are tied up with the clay mineral, illite, which is a potassium aluminum silicate that is found in all of the underclays in Indiana.

233 Q. Is that considered to be a fluxing clay or material in a clay?



A. Not necessarily. It is the same mineral as muscovite, except it is in very small particles.

234 Q. Dr. Murray, what I am trying to get at is what you consider to be a significant difference for purposes of making sewer pipe. You have used the term several times that you didn't think that was a significant difference between [fol. 175] the deposits. What do you mean when you use that term?

A. Well, I am talking about the end product properties. They went from the mine on the south side of the road to the mine at the north side of the road, and by proper testing in their own laboratory at Cannelton they make a product that was essentially the same, and the raw materials that they used were from the same age clay deposit. They could use these materials without changing their procedures so that they were significantly the same materials to work with.

235 Q. Then your answer seems to be they were still suitable for use in making sewer pipe, is that correct?

A. They were both a refractory material which would class these two clays as fire clays, and they could be used in making this sewer pipe.

236 Q. So that if there are other materials that were suitable for making the same quality of sewer pipe, or quality sewer pipe, there would be no significant difference between the materials, is that correct?

A. I know that the Cannelton Sewer Pipe has done a lot of investigating in the area for other clays. They have found none, to my knowledge, in Indiana that have the refractoriness of these clays that they were using back in 1951 and 1952.

237 Q. At least, they haven't found any as close as they can find them in Kentucky, is that correct?

A. That is correct, and I don't know the refractoriness of the clay in Kentucky. I know that Cannelton Sewer Pipe, because it has used this fire clay in their product, was a very, very good product from the results of the State Highway Testing Laboratory. It had a very low absorption which is the result of using this fire clay and, as a result of using fire clay, their maturing temperature was higher, so they got a better body.

[fol. 176] Mr. Friesen: I think I have no further questions.

Mr. Travis: That is all.  
And Further Deponent Saith Not."

The Court: Do you have any further witnesses this afternoon?

Mr. Travis: (For Pltf.) I have none. At this time the plaintiff will rest.

The Court: You say "plaintiff rests." Subject to the original agreement of the production of one additional witness?

Mr. Travis: (For Pltf.) Yes.

(At this time the Plaintiff rests subject to agreement as made between counsel for plaintiff and counsel for defendant.)

The Court: We will stand recessed until two o'clock.

(Whereupon the Court was recessed at 12:10 p.m., to reconvene at 2:00 p.m. this date.)

Indianapolis, Indiana, March 12, 1958, 2:04 o'clock p.m.

(The Court met pursuant to adjournment, and the trial was resumed as follows:)

The Defendant, to further maintain the issues in its behalf, offered and introduced the following evidence, to-wit:

[fol. 177] EUNICE LANDGREBE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Friesen:

1 Q. Would you give the Court your full name?

A. Eunice Landgrebe.

The Court: How do you spell your last name?

The Witness: L-a-n-d-g-r-e-b-e.

2 Q. Where do you live?

A. Huntingburg.

3 Q. Huntingburg, Indiana?

A. That's right.

4 Q. Are you associated with a business in Huntingburg?

A. Huntingburg Brick Company.

5 Q. And what is your position with that company?

A. I am President of the company.

6 Q. How long have you been associated with that company?

A. Since 1947.

7 Q. Do you own your own mine or pit at Huntingburg?

A. Yes, sir.

8 Q. And what is the form that your mine or pit takes there?

A. It is an underground mine. We have a tippie.

9 Q. And do you know if there are any other underground mines in the Huntingburg Area?

A. Yes. We use an elevator system, and they use a slope mine.

10 Q. What other companies have mines in that area?

A. Well, it is not any company; just an individual. He has a little mine there that we purchase clay from.

[fol. 178] 11 Q. Does the Louisville Pottery Company have a mine there?

A. Well, now, I believe they still have it.

12 Q. Do you know if they had one in 1951?

A. I couldn't prove it. I think they did. There is a mine out there, and I understood it belonged to the Louisville Pottery.

13 Q. During the Year 1951 did you purchase any clay for the production of your ceramic products?

A. Yes, sir.

14 Q. And how much clay did you purchase during that year?

A. 4,438 tons.

15 Q. Have you taken this figure from the books and records of the company?

A. Yes, sir.

16 Q. And what price did you pay for that?

A. \$3.25 delivered at the plant.

17 Q. Is this also shown on the books and records of your company?

A. Yes, sir.

18 Q. Do you know what kind of clay you mine?

A. It is called fire clay.

19 Q. Do you know what kind of clay you purchase?

A. Fire clay.

20 Q. And do you know the—if that—both of those clays come from underneath a coal seam?

A. Well, ours does, yes, I am sure they do, because our better clay did come from underneath the coal, just a small amount of coal.

21 Q. You have testified that you own your own mine and that you purchased clay from another mine in the Huntingburg Area during 1951. Why didn't you mine all the clay that you needed for yourself?

A. Well, sir, at the time I didn't have enough clay. [fol. 179] My capacity at the mine was not enough to fill my orders, and I had to purchase some.

22 Q. What is the capacity of your mine?

A. Well, I would say 40 tons, about 40 tons a day.

23 Q. And you needed more clay in order to fill the orders that you had in 1951?

A. That's right, sir.

24 Q. Did you purchase clay prior to 1951?

A. '50.

25 Q. Have you purchased clay since that time?

A. Yes, sir.

26 Q. Ever since that time?

A. '52, '53, '54, yes, sir, I have.

27 Q. Since '50?

A. Yes.

Mr. Friesen: (For Déft.) Would you you mark this Government's Exhibit G for identification?

(The defendant, for purposes of identification, handed the reporter a certain object for marking, and which was by said reporter marked Government's Exhibit G.)

28 Q. (By Mr. Friesen) Mrs. Landgrebe, I hand you what has been marked for identification Government's Exhibit G and ask if that is a brick which has been manufactured by your company?

A. Yes, sir.

29 Q. How can you tell that was manufactured by your company?

A. Well, our name is on the back of it.

Mr. Friesen: (For Deft.) Your Honor, I call the Court's attention to the similarity in color with the clay used by

the plaintiff, as shown on Plaintiff's Exhibit 11, and the [fol. 180] like similarly with the Plaintiff's Exhibit 16, which was identified as shale taken from the plaintiff's mine.

I offer the Government's Exhibit G.

(Government's Exhibit G was offered in evidence at this time by Mr. Friesen.)

Mr. Travis: (For Plt.) No objection.

The Court: It is admitted and exhibited in evidence.

(Government's Exhibit G is admitted into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following, to-wit:)

(Here Insert.)

30 Q. (By Mr. Friesen) What was the form of the clay that you purchased in 1951? By this question I mean was it ground and screened before it was delivered to you?

A. No, sir.

31 Q. Was it delivered in the form that it was brought out at the mine?

A. That's right, sir.

Mr. Friesen: (For Deft.) I have no further questions.

Cross-examination.

Questions by Mr. Travis:

32 Q. Mrs. Landgrebe, whom did you buy the clay from in 1951?

A. It was the old Uhl mine.

33 Q. U-h-l?

A. That's right.

34 Q. That was owned by Louie Uhl?

A. Uhl Pottery.

35 Q. Were they in business then?

[fol. 181]—A. No, they were not.

36 Q. What happened to them?

A. The Uhl Pottery?

37 Q. Yes, the pottery part.

A. Well, one thing, they had labor trouble at the mine, and he didn't want to fool with it. He had so much money he didn't know what to do with it, so he just quit.



38 Q. Then so the Uhl Pottery from whom you purchased this was no longer using any clay of their own?

A. No. He just moved away, and it was there.

39 Q. Isn't it true Mr. Uhl came to you and asked you to take some clay from him, because he had some more clay left in his mine and wanted to mine it to have a little something to do?

A. No, he didn't do it.

40 Q. He owned it.

A. (Interposing) He thought he could make more money off of it, and I was very glad to get it.

41 Q. And you didn't have enough clay in your own mine at that time to satisfy your own production?

A. That's right, sir.

42 Q. What do you make up there?

A. We make brick like this (Referring to Government's Exhibit G), and, then, we use different faces on the brick and what they call second-grade fire brick.

43 Q. You make a fire brick?

A. A brick like this, only solid.

44 Q. Brick out of the same clay you are talking about?

A. Yes, that's right.

45 Q. That is a refractory product?

A. That is what it was.

Mr. Travis: (For Pltf.) I have no further questions, that's all.

[fol. 182] Mr. Friesen: (For Deft.) I have no further questions.

The Court: Did Mr. Uhl have any interest in your company?

The Witness: He does not.

Mr. Friesen: (For Deft.) You may step down Ma'am. Mrs. Landtgebe would like to be excused with the Court's approval.

Mr. Travis: (For Pltf.) She may leave as far as we are concerned.

The Court: You may be excused.

The Witness: Thanks a lot.

(Witness Excused)

JAMES EDWARD EDER, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Friesen:

1 Q. Would you give your full name, please?

A. Mr. James Eder.

2 Q. Where do you reside, Mr. Eder?

A. Brazil, Indiana.

The Court: How do you spell your last name?

The Witness: E-d-e-r.

3 Q. (By Mr. Friesen) Are you associated with a business in Brazil?

A. Yes.

4 Q. What is that business?

A. Log Cabin Coal Company.

5 Q. Do you do business under any other name?

A. No.

6 Q. What product does the Log Cabin Coal Company produce?

[fol. 183] A. Mostly clay now.

7 Q. Are you producing any coal now?

A. Scarcely any, just a little, what little we run across.

8 Q. Your main production is clay?

A. That's right.

9 Q. In 1951 were you producing both coal and clay?

A. Well, mostly clay then, I think; yes, still mostly clay.

10 Q. Would you say you were in the business of producing clay in 1951?

A. We had just started it.

11 Q. Did you sell clay in 1951 from property owned or leased by you?

A. The clay we produced it was either leased or owned by us at that time.

12 Q. Where did you sell it?

A. In and around Brazil.

13 Q. To whom did you sell that production in 1951?

A. Most of it, I think all went to Arketex, I believe.

14 Q. Arketex?

A. Yes.

15 Q. Do you know how to spell that?

A. A-r-k-e-t-e-x Ceramic Corporation.

16 Q. Do you know what product they produce?

A. Well, it is a glazed ceramic tile.

17 Q. Would you describe it as a structural tile?

A. I suppose that is what they do.

18 Q. What type of clay did Arketex buy from you in 1951?

A. Well, their description was a plastic clay, and what they called more of a sandy clay; but that was just a clay description.

19 Q. Was all of this clay you sold to Arketex taken from beneath coal or in what is called an "underclay"?

A. Yes.

[fol. 184] 20 Q. And where is your pit or mine located from Brazil proper?

A. Well, we have one south of Brazil, and one north of Brazil.

21 Q. How far south is the one south of Brazil?

A. About 12 miles.

22 Q. And north of Brazil?

A. About a mile.

23 Q. Do you have the figures on the tonnages of clay sold by you in 1951?

A. Yes, I have.

24 Q. Can you tell the Court how much clay you produced and sold in 1951?

A. (Witness referring to notes) At the pit north of town we sold 39,699 tons.

25 Q. And from the other pit?

A. 21,978 tons.

26 Q. And all of this was sold to Arketex?

A. I think most of it was, yes.

27 Q. Do you have the price per ton that was paid for this clay?

A. No, I haven't got it in dollars and cents.

28 Q. Do you have the total?

A. Yes, I have.

29 Q. (Cont'g) Sales?

A. Yes.

30 Q. What is the total sales' price on each?

A. The first pit, total sales, was \$74,191.70.

31 Q. And on the second pit?

A. 42,525.25.

32 Q. Is that a delivered price?

A. That's right.

33 Q. Approximately how far do you deliver from the northern pit to Arketex?

A. Well, there it will average probably two and one-half to three miles.

[fol. 185] 34 Q. And from the southern pit?

A. Average somewheres around 10 miles.

35 Q. 10 miles.

A. That goes into two different factories. They are not located very close together.

36 Q. Have you continued to sell clay in the Brazil Area since that time?

A. Yes, we do.

37 Q. Are you still in fact selling clay?

A. Yes.

38 Q. Has your production increased since that time or decreased?

A. It has increased.

39 Q. Just for an example how much clay did you sell—Do you have the figures on '52?

A. Yes, I have the figures. They weren't much higher than '51.

Mr. Travis: (For Pltff.) To which the plaintiff objects for the reason '52 is not involved in the cause of action now being tried.

Mr. Friesen: (For Deft.) I withdraw the question, your Honor. I have no further questions.

Cross-examination.

Questions by Mr. Travis:

40 Q. Is that a Government report you have in your hand?

A. Yes, it is.

41 Q. What is that report?

A. It's "Bureau of Mines."

42 Q. That is the questionnaire you sent in to the Bureau of Mines?

A. That's right. (Document tendered to Mr. Travis).

43 Q. On the north pit that you have described, how did [fol. 186] you describe that clay that you reported to the Bureau of Mines?

A. Well, just as a plastic clay and fire clay—fire clay and plastic clay.

44 Q. You reported it under the classification of "fire clay"?

A. That's right.

45 Q. And on the other pit?

A. Under the fire clay, the same as the other.

46 Q. Was the clay that you mined and sold in 1951 exposed from the coal?

A. Well, some of the coal had been taken off.

47 Q. The coal was gone when you started mining in '51?

A. Yes.

Mr. Travis: (For Plff.) That's all.

Mr. Friesen: (For Deft.) No further questions.

#### Further Cross-examination.

#### \* Questions by Mr. Travis:

48 Q. One more thing, Mr. Eder, excuse me. We have heard the testimony of Mr. John C. Hutchinson, who is with the Ayer-McCarel Clay Company, whom you know I presume; Mr. Charles N. Smith with the G. and F. Corporation; and yours, all from Brazil. Who are the other companies, or, are the other companies in Brazil that sold clay in 1951?

A. Well, that, I don't believe I could answer.

49 Q. Don't you know all those fellows over there?

A. Big Bend Collieries was at the time, I believe, and Quality Coal Corporation.

50 Q. Which one was that? Quality Coal Corporation?

A. Yes.

51 Q. Who else?

[fol. 187] A. You have G. and F.?

52 Q. Yes.

A. I don't know if Turner Coal Company did. I think they did, too. That is about all of them.

Mr. Travis: (For Plff.) That's all.

A. (Cont'g) Oh, yes, Maumee Collieries, that is another one.



Mr. Travis: (For Pltf.) That's all.

The Court: Redirect?

Mr. Friesen: (For Deft.) No further questions.

The Court: May this gentleman be excused, gentleman?

Mr. Travis: Yes, as far as the plaintiff is concerned.

The Court: All right, sir, you are excused.

(Witness excused.)

GEORGE C. JAMES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Friesen:

1 Q. Give your name.

A. George C. James.

2 Q. Where do you reside?

A. Brazil, Indiana.

3 Q. And are you associated with a business at Brazil?

A. Yes, sir.

4 Q. What business is that?

A. Big Bend Collieries.

5 Q. What position do you hold with that company?

A. Auditor.

6 Q. Have you kept the books and records of the Big Bend Collieries during the period 1951?

[fol. 188] A. Yes, sir.

7 Q. What business was the Big Bend Collieries engaged in at that time?

A. Mining and shipping coal, clay, and shale.

8 Q. From what source did the coal, clay, and shale come?

A. From stripping.

9 Q. And the clay and shale you sold came from beneath the coal?

A. The clay did; the shale is above the coal.

10 Q. The clay was underclay?

A. Yes, sir.

11 Q. How much of the clay, if you know, was taken approximately?

A. Well, all we had a market for; I expect in the neighborhood of 75 per cent of the amount that was available.

12 Q. Do you know how deep you took the clay from underneath?

A. Yes, about 18 inches, 18-20 inches.

13 Q. To whom did you sell clay?

A. Well, we sold various concerns—Arketex Ceramic Corporation in Brazil; the Hill Brick Company in East St. Louis; American Terra-Cotta, Crystal Lake, Illinois; Hadley Pottery Company at Louisville, were among the customers. I don't know that I could name them all to you.

14 Q. Do you know if in 1951 you were shipping as far as Louisville?

A. I don't remember, sir.

15 Q. Do you know if you were shipping to East St. Louis at that time?

A. I am not certain of that. I don't have the records of the Receivables, of where the clay went; but I presume we were, because we had that Hill Brick account for a long time, a number of years.

[fol. 189] 16 Q. Do you know how far East St. Louis is from Brazil?

A. Around 180 miles.

17 Q. Do you know how far Louisville is from Brazil?

A. That—It is around 100 miles, I believe.

18 Q. Do you know how far it was from Crystal, Illinois?

A. Crystal Lake. That is a suburb of Chicago; that would be in the neighborhood of 170, I think.

19 Q. How was it transported in each case?

A. By rail, except Louisville, and Louisville was trucked.

20 Q. Do you have the figures with you on the tons of clay sold by you in 1951?

A. Yes, sir, 25,124.39 tons.

21 Q. Do you know how much shale you sold during that year?

A. I don't have it broken down into the calendar year. We are on a fiscal-year basis.

22 Q. What is your fiscal year ending?

A. July 31.

23 Q. Would you give us the fiscal year ending July 31, 1951?

A. In tons?

Q. Yes, please.

A. I don't have the tons totaled, either; I just have the money. Wait, do I have that on this Government report? The shale that was sold in '51 was 55,476 tons.

25 Q. Do you know to whom that was sold?

A. Yes, sir, Lone Star Cement at Greencastle.

26 Q. How far is that from Brazil?

A. That is only around 15-18 miles.

27 Q. Does the Big Bend Collieries now sell any clay?

A. No, sir, they do not.

[fol. 190] 28 Q. When did they stop selling clay?

A. In '55, 1955.

29 Q. And do you now sell any coal?

A. No, sir. We are in the process of liquidating the company, and have been since 1955.

30 Q. What was the gross, or, was the price that you charged for this underclay in 1951?

A. Well, the 25,124 tons brought \$38,794.00.

31 Q. And that's—that price include any delivery cost at all?

A. No, sir. That is f.o.b. cars.

32 Q. How far were the cars from where you were producing?

A. It wouldn't be more than a mile; perhaps less than a mile.

33 Q. Do you have the price or a dollar figure on the sales of shale?

A. Yes, sir. It was a Dollar a ton.

34 Q. You sold it for a Dollar a ton?

A. Yes, sir.

35 Q. Was that a delivered price?

A. No, sir; that is f.o.b. cars, also.

36 Q. For a Dollar a ton.

A. Yes.

Mr. Friesen: (For Deft.) I have no further questions.

Cross-examination.

Questions by Mr. Travis.

37 Q. Do you know whether the Hill Brick Company in East St. Louis, Illinois, had any clay available to them in their immediate vicinity?

A. No, sir, I do not.

38 Q. Do you know that about any of the other persons to whom you sold except Arketex?

[fol. 191] A. Arketex would have, from what I have learned here today. The Hadley Pottery might have in Louisville; I don't know what type of clay they would have to have.

39 Q. What does Hadley make?

A. Pottery.

40 Q. A very high-grade material?

A. I understand it is.

41 Q. What was the company at Crystal Lake, Illinois?

A. American Terra-Cotta.

42 Q. Do you know whether they had any supply available to them any nearer than the vicinity of Clay County, Indiana?

A. I do not know. I would not think so, or they wouldn't have paid the freight rate to have Arketex ship it.

43 Q. Do you know what they used the clay for?

A. Terra-cotta ware.

44 Q. Did they blend it with any other clay?

A. I couldn't tell you.

45 Q. Terra cotta is another high-grade pottery, isn't it?

A. Yes, sir.

46 Q. And high priced?

A. I couldn't tell you. I am not in a position to know; but I think it is.

47 Q. You referred to a Government report. May I see that, please?

A. Yes, sir. (Tenders report to Mr. Travis.)

48 Q. Is it true you referred to your clay that you sold in this Government's report as fire clay, plastic?

A. Yes, sir.

Mr. Travis: (For Pltf.) That's all.

Mr. Friesen: (For Deft.) I have no further questions, your Honor.

[fol. 192] The Court: Do you know the history about Brazil over there in coal mining?

The Witness: Pretty well.

The Court: When did they start mining, strip mining?

The Witness: I think the old Big Bend Coal Company was probably the first in 1924.

The Court: 1924. There was not any stripping to speak of before then?

The Witness: Not to my knowledge.

The Court: Do they have shaft mines over there?

The Witness: No, sir.

The Court: Prior to that, I mean.

The Witness: Yes, yes, there were, yes, sir.

The Court: When did they start mining coal over there?

The Witness: I couldn't tell you. You mean the first?

The Court: Yes.

The Witness: Way beyond my time.

The Court: Do you know when these clay products companies over there, like Arketex, and so on, were established? About when, what time?

The Witness: Well, the Arketex Ceramics Corporation is the successor to the Clay Products Company, and they were in business in 1931, when I came there. I don't . . .

The Court: (Interposing) Do you know whether any of the ceramics companies over there were established as far back as 1910, 1908?

The Witness: I couldn't tell you.

The Court: All right.

Mr. Friesen: (For Deft.) Nothing more.

(Witness excused.)

[fol. 193] CARL F. KUMPF, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Friesen:

1 Q. Give your full name to the Court, please.

A. Carl F. Kumpf.

The Court: How do you spell your last name?

The Witness: K-u-m-p-f.

2 Q. (By Mr. Friesen) Mr. Kumpf, where do you reside?

A. Brazil, Indiana.

3 Q. Are you associated with any business in Brazil, Indiana?

A. I am.



4 Q. What is that business?

A. Quality Coal Corporation.

5 Q. Are you an officer of that corporation?

A. I am.

6 Q. What is your office?

A. President.

7 Q. And how long have you been associated with the Quality Coal Corporation?

A. Since its beginning, July 1, 1939.

8 Q. And what—In what business does the Quality Coal Corporation engage?

A. Producers of clay, or of coal, principally, and clay.

9 Q. And in the Year 1951 were you producing coal and clay?

A. I was.

10 Q. And from what source was the clay taken by you in the Year 1951?

A. Strip-mine method, if that is what you mean.

[fol. 194] 11 Q. Was it taken from under the vein of coal?

A. Under the coal.

12 Q. And that would be from under the Brazil block coal?

A. That's right.

13 Q. How deep did you cut into the vein of clay?

A. Well, in that year we were in the Brazil Area and it would average reasonably close to 20 to 24 inches, sometimes going up to 25 or 26.

14 Q. To whom did you sell this clay?

A. In just '51?

15 Q. 1951.

A. Arketex Ceramics Corporation.

16 Q. And have you sold this same clay to any other ceramic producers in that area?

A. We have sold not in that year, but in possibly '54 or '55 we did sell clay to Poston Brick Company.

17 Q. Do you know what product they made?

A. Yes, I believe they made a face brick.

18 Q. Do you know if it was a buff brick?

A. It was a buff brick.

19 Q. Where is this clay company located?

A. Poston Brick Company is in Springfield, Illinois, and Martinsville, Indiana.

20 Q. Do you know how far it is to Springfield, Illinois?

A. It would only be a guess.

21 Q. More than a hundred miles?

A. I believe it is over a hundred miles. That would be a guess, though.

22 Q. Do you have the figures with you on the number of tons of clay you sold in 1951?

A. I do.

23 Q. How much did you sell?

A. In '51?

[fol. 195] 24 Q. Yes, sir.

A. 41,918 tons.

25 Q. And at what price did you sell that?

A. I have my figures based on f.o.b. mine.

26 Q. F.o.b. mine. What is the price f.o.b. mine?

A. \$1.48, \$1.4817.

27 Q. Is that the actual price you charged, or is that an average price?

A. That is what we call—got out of it after delivery; in other words, that was not the selling price of the clay because we delivered this clay into the plants.

28 Q. Do you remember what your price per ton on delivered clay was?

A. Well, in 1951 it was—I will make an honest guess, —about \$1.90, I believe.

29 Q. You do not have the record?

A. I do not have the record.

30 Q. How did you come to this figure, 1.4817?

A. That was what my Office Manager figured, and it was based on our report to the Government, Bureau of Mines.

31 Q. How did you list it on your report to the Bureau of Mines, if you know?

A. We listed it as 41,918 tons at a value of \$62,111.

32 Q. Under what heading on the form, if you know?

A. Plastic clay.

33 Q. Is that a sub-heading of fire clay?

A. It is.

34 Q. (Cont'g) . . . on the form. Mr. Kumpf, could you mine coal if you didn't also mine clay profitably?

A. We are not speaking in—You are only speaking of me, my operation at the present time?

35 Q. Right.

A. No.

[fol. 196] 36 Q. You absorb some of the cost of mining in the sale of clay as well as in the sale of coal, is that correct?

A. Right.

37 Q. And could you not profitably do either without the other?

A. That is what I wanted to add: You couldn't mine the clay either.

38 Q. Without mining coal?

A. That's right. I can — you an illustration of that, if you would like.

39 Q. Please do.

A. We have two mines; one is primarily in coal, and clay is a by-product. The other mine, when clay was a little short at that particular time for that type of clay, we opened up a pit where there had been deep mining and even some had been stripped over by the clay and left, so there was partial coal; so, that mine was actually started for clay with coal as a by-product, and there is a lot of difference in the price of it, too.

Mr. Friesen: (For Deft.) I have no further questions.

Cross-examination.

Questions by Mr. Travis:

40 Q. In 1951 you sold all of your sales to Arketex?

A. I am sure of that, yes, sir.

41 Q. How far was Arketex from your mine? Your delivery, in other words.

A. Well, in 1951, I would say it was about a four-mile haul.

42 Q. The difference between your estimate of \$1.90 and your f.o.b. mine price of \$1.48 would be your delivery cost, wouldn't it, per ton?

A. That's right.

[fol. 197] 43 Q. In these two mines do you have different types of clay?

A. They are both graded as the same clay, although they do have a different shrinkage. One has a little higher content of sand. There is a difference.

44 Q. Is one of them a higher quality?

A. No.

45 Q. Can be used for different products?

A. Can be used for the same product. The only thing is in mixing the plastic clay to hold down their shrinkage they will add a sandy clay, and that is the only difference. The ultimate outcome is the same.

46 Q. Do you know whether the Poston Brick Company in '54 and '55, either of their plants had available to them a supply of clay in the vicinity of their plant?

A. I couldn't answer that. I know they were buying themselves. Evidently they didn't have the proper layer or they would have bought it there; they would not have paid that freight.

47 Q. In 1951 you already said your principal business was coal.

A. Yes.

48 Q. Clay at that time, at least, was a by-product?

A. That's right.

49 Q. What were the tons in dollars of coal sold by your company in 1951?

A. I would not have the slightest idea.

50 Q. How much times more in value would you guess that your sales of coal were, as compared to your clay?

A. Well, in 1951, 41,900 tons of clay would not be all the clay that would have been made available.

51 Q. That is all you sold?

A. All the business we had. We had more clay available. [fol. 198] 52 Q. What was your gross volume of business as your best guess in 1951?

A. I imagine we sold, maybe, at that time maybe a half or two thirds the amount of clay we could have, if we would have retained it all.

53 Q. You misunderstood. What was your gross sales of coal and clay, your gross income in 1951?

A. That is going to be a guess. I imagine of coal and clay would be \$480,000.

54 Q. You think that is your total volume of business in 1951?

A. I won't miss it very far.

55 Q. \$480,000, of which \$62,000 was clay?

A. Right. Understand I do not have those exact figures with me.

Mr. Travis: (For Pltf.) That's all.

Mr. Friesen. (For Deft.) I have no further questions.

(Witness excused.)

Mr. Friesen. (For Deft.) Your Honor, we have the deposition we would like to read, and, then, the Government will be through with its case.

(The defendant, for purposes of identification, handed the reporter a certain document for marking, and which was by said reporter marked Government's Exhibit H.)

Mr. Friesen: (For Deft.) Mr. Travis, I am asking you to examine this Directory of Coal Producers in Indiana, and I am intending to offer into evidence pages 10 through 14, of this edition, page 11 of which has already been admitted.

Mr. Travis: (For Pltf.) And 13 is.

Mr. Friesen: (For Deft.) It is just an explanation, your Honor, of what some of those charts consist, which [fol. 199] explanation is not contained on the chart. I have underlined portions of it, which, I think, is important, and I note for the record that those interlineations are my own.

Mr. Travis: (For Pltf.) I might state to you I am opposed to your doctoring up your exhibits with your underlin-

The Court: Suppose we take a few minutes' recess.

Mr. Friesen: (For Deft.) Your Honor, may I interrupt? Mr. Smith, who testified yesterday, has examined the computations which he made, and states to me that he made a misplacement of the decimal point, and it should be 18 cents per ton mile, rather than 1.8 on the short-haul distances.

The Court: Do you want to call him as a witness?

Mr. Travis: (For Pltf.) We will stipulate the 18 cents is correct, the correct figure.

Mr. Friesen: (For Deft.) Mr. Smith came back to make the record clear.

The Court: All right, we will recess a few minutes.



(Whereupon the Court was recessed at 2:50 o'clock p.m., and reconvened at 3:00 o'clock p.m., at which time the following proceedings were had:)

Mr. Friesen: (For Deft.) Mr. Travis, do you have any objection to this?

Mr. Travis: (For Pltf.) No.

Mr. Friesen: (For Deft.) Your Honor, I offer this more as background. These four pages describe some of the terminology of the codes. I will read the part which I have underlined:

"Names which the Indiana Geological Survey uses in a stratigraphic sense are Lower Block, Upper Block, Minshall, Coal II, Coal III, Coal IV, Coal V, Coal VI, and Coal VII. Some of the names which are used [fol. 200] locally or which are trade names are Lower Cannelton, Upper Cannelton, St. Meinrad, Shoals, Huntingburg, Jasper, Buffaloville, Lower Millersburg, and Upper Millersburg. Trade names also are used for the more widespread coals. Coal V, for example, has been called Alum Cave, Glendora, and Petersburg, and the Upper and Lower Block coals have been called Brazil Block and Block."

I call the Court's attention to page 13, which has been identified otherwise as an exhibit. If you notice the line, which divides the Coal III from the Lower and Upper Block coals and the coals contained in the southern part of the State, runs in an area which includes Cannelton, all the way, way up; includes Clay County, and this classification below the Coal III is further illustrated on page 11, which is also an exhibit introduced by the plaintiff.

(Government's Exhibit H was offered in evidence at this time by Mr. Friesen.)

The Court: Show Government's Exhibit H admitted, read and exhibited in evidence.

(Government's Exhibit H is admitted and read into the evidence, and made a part of the record in this case, said exhibit being in the words and figures following to-wit:)

(Here Insert.)

The Court: Call your next witness.

Mr. Friesen: (For Deft.) I would like now to read the deposition of Mr. L. R. Chapman.

Mr. Travis, will you agree to dispense with the reading of the preliminary matter?

Mr. Travis: (For Pltf.) Yes.

(At this time the deposition of L. R. Chapman was read into the record by counsel for plaintiff and counsel [fol. 201] for defendant, said deposition, as read, being in the words and figures following, to-wit:)

"Mr. L. R. CHAPMAN, having first been duly sworn, deposed and said as follows, to-wit:

Direct examination.

By Mr. Ernest C. Friesen, Jr.

Mr. Friesen: Give your full name, Mr. Chapman.

Mr. Chapman: L. R. Chapman.

2 Q. And where do you reside?

A. My home, or business?

3 Q. I'd like to get both. Where is your home?

A. Tell City, Indiana.

4 Q. And where are you in business, of—

A. (Interrupting) Lewisport, Kentucky.

5 Q. Are you associated with any firm or company?

A. Yes, sir.

6 Q. And what is that company or firm?

A. L. R. Chapman, Inc.

Mr. Travis: That's L. R. Chapman, Inc.

7 Q. And what is the business of L. R. Chapman, Inc.?

A. Coal mining, farming, and construction work.

8 Q. And were you associated with L. R. Chapman, Inc., during the period 1949 through 1957?

A. Yes, sir.

9 Q. Was—what was the business—business of the L. R. Chapman, Inc., during the period 1949, 1950, 1951, 1952?

A. The same.

Mr. Travis: Just a minute. Plaintiff objects to any questions not relating to the year 1951."

The Court: Overruled. It is a preliminary matter.

[fol. 202] 10 Q. "Mr. Chapman, do you own property in the vicinity of Lewisport, Kentucky, and Hawesville, Kentucky?

A. Yes, sir.

11 Q. And what is the nature of the property?

A. Well, land.

12 Q. Now, generally speaking, where is the land located, in what county or counties?

A. Hancock County.

13 Q. It's all located in Hancock County?

A. Yes, sir.

14 Q. And how much land do you own in Hancock County, approximately?

A. Approximately twenty-eight hundred acres.

15 Q. Now, you have testified that in your business of—or the corporation is in the business of mining coal. Is that in Hancock County?

A. Yes, sir.

16 Q. Do you find any other valuable mineral product as a result of mining coal in Hancock County?

A. (Witness in thought).

17 Q. Let me put it this way, do you uncover clay and shales as a result of—of mining coal?

A. Yes.

18 Q. And do you personally use this clay and shale which is uncovered—

A. (Interrupting) No.

19 Q. (Continuing) in the process?

A. (Shakes head negatively.)

20 Q. Does any other party use the clay and shale in manufacturing of any items that you know of?

A. I don't understand your question.

21 Q. Now you have testified that you uncover clay and shale in the process of strip mining coal.

A. That is not true.

22 Q. All right. You have stated before, I believe, [fol. 203] that you do uncover clay and shale as a part of your process.

A. Yes, sir.

23 Q. And I have asked if that material, clay and shale, is ever used in the manufacturing of any product in this area.

A. I still don't understand your question. In the coal operation, no.

24 Q. Do you know if they manufacture any brick or tile or sewer pipe in this area?

A. Not from any clay that came from the coal.

25 Q. Did any—Do you know if they ever manufacture these items in this area?

A. Yes, I know that there is brick made and tile manufactured.

26 Q. And do you know that this is made out of clay and shale?

A. Yes, sir.

27 Q. Now, the clay and shale which is used, does it come from lands that is yours or was formerly yours?

A. It was originally mine, yes, sir.

28 Q. And how does the clay and shale get to the manufacturer?

A. Different ways. Some of the manufacturers haul it theirself, and in some instances we deliver.

29 Q. Do they dig their own clay from the lands?

A. Repeat that.

30 Q. Do they dig or mine the clay from the land?

Mr. Travis: Just a minute. May I have the record state as to whether your questions are directed to the year 1951?

Mr. Friesen: My questions are directed to the general process. I am laying the foundation before the questions, which I shall ask specifically about specific years. To prevent leading the witness and his answers, I'm asking him generally about what he knows.

[fol. 204] Mr. Travis: Well, I want the record to show a general objection by the plaintiff to any questions regarding the operations of L. R. Chapman, questions regarding mining clay or shale from lands owned by L. R. Chapman, Inc., other than those existing in the year 1951, which is the only year involved in the cause of action before us."

The Court: You are objecting to the question?

Mr. Travis: (For Pltff.) Yes, I think the objection should apply to Question 30, which is: Do they dig or mine the clay? supplemented by "And by 'they' I'm referring to the people who used the material" for the reason that

the question is not limited to the year involved in this suit, being 1951.

The Court: You say you follow it up later on?

Mr. Friesen: (For Deft.) Your Honor, I ask about some other years, but related to the year, '51, the evidence is in the record as to that year.

Mr. Travis: (For Pltf.) Later, your Honor, for instance, we get down to the Question 39, which is just ~~that~~ questions long, and the question then gets specifically directed to '49 and '50; so, this is not particularly laying the ground-work for 1951 in any sense of the word.

Mr. Friesen: (For Deft.) I was attempting to explain or get into evidence a continuing market; not a market which occurred at one specific time and one specific year. A market is not something which comes in and out of existence. And I submit it is relevant as to whether there was a market in '49, '50, '51, '52, and '53.

The Court: All right. Overruled. You may answer the question.

A. They pay me to do it.

32 Q. Do the users of the clay or shale always pay you to do it?

[fol. 205] A. Yes, sir.

33 Q. They do not mine it themselves?

A. Not of my knowledge.

34 Q. You have stated that the land was formerly owned by you. Would you explain what you mean by 'formerly owned by you'?

A. Well, at one time I owned it. I had a deed of general warranty for it.

35 Q. And you sold the land to the users, is that correct?

A. Some of it.

36 Q. And what have you done with the other land?

A. It's still mine.

37 Q. And from that land that is still yours, you are selling shale and clay to the users?

A. No, sir.

38 Q. Well, what is the arrangement by which you deliver the shale and clay to these people?

A. With a mining contract.

39 Q. Now, do you have a—(To the reporter) Strike that.



During the year, 1949, 1950, did you mine and deliver clay and shale to any ceramic producer in the area?

A. Yes.

Mr. Travis: To which the plaintiff objects for the reason the years asked in the question are not involved in the cause of action now before us."

Mr. Travis: (For Pltf.) The plaintiff would like to renew its objection to the specific question related to the years prior to the enactment of the law under which the claim for refund is based.

The Court: Overruled.

40 Q. "To whom did you deliver?

A. The Owensboro Sewer Pipe Company.

41 Q. Do you have in your office the records of the [fol. 206] volume and charges which you made against the Owensboro Sewer Pipe Company for those years?

A. Yes.

42 Q. Would you produce those records?

A. Miss Gabbert, would you bring the records for the Owensboro Sewer Pipe Company. (To Mr. Friesen) Of what year?

43 Q. '49 and '50. I will be asking about '52, also.

Mr. Travis: Plaintiff renews its objection to the question for the same reason."

The Court: Overruled.

44 Q. "Now during the year 1951 did you sell any material to Owensboro?

Mr. Travis: Just a minute. I object to the question for the reason the witness has already stated that he did not sell the material.

Mr. Friesen: (To Mr. Travis) You have indicated what answer you wanted, Mr. Travis.

45 Q. During the year 1951, did you deliver any clay and shale to the Owensboro Sewer Pipe Company?

A. Yes, sir.

46 Q. Well, then, with the records for 1949-'50, we'd also like you to produce those for '51.

(Whereupon, Mr. Chapman is Handed Documents by Miss Gabbert)

A. This is 49. (Handing documents to Mr. Friesen).

47 Q. Now, have you stated that you did not own this land at this time?

A. I did not own the land at that time.

48 Q. And who did own the title to the land?

A. The Owensboro Sewer Pipe.

49 Q. Do you know if they still have title to this land?

[fol. 207] A. They do.

50 Q. Are they still taking clay and shale from that land?

A. No.

51 Q. Do you recall, or do you have a record of how much they paid for the land from which this clay and shale was taken?

A. Fifty dollars for the five acres on this first contract.

52 Q. Now, were there subsequent contracts?

A. Well, there was a deed.

53 Q. And how much land was conveyed by that later deed?

A. Three-tenths of 95 acres.

54 Q. Is that an undivided interest in three-tenths of 95 acres?

A. Yes, sir.

55 Q. Who retained the rest of the interest?

A. The Owensboro Brick Company, the Boonville Brick Company, and the Rockport Brick Company, and myself.

56 Q. You owned an undivided interest also in this land?

A. Yes, sir.

57 Q. And do you recall how much Owensboro paid to you for that subsequent transfer?

A. One dollar.

58 Q. For three-tenths of 95 acres?

A. No, Owensboro Sewer Pipe—yes, One Dollar for that was One Dollar and other valuable consideration.

59 Q. And do you recall what the other valuable consideration was?

A. Yes, sir.

60 Q. What was that?

[fol. 208] An operating contract to mine clay and deliver.

61 Q. And this contract to mine and deliver was a part of your agreement by which you transferred legal title to the land, is that correct?

A. Yes, sir.

62 Q. Now, Mr. Chapman, I hand you what has been delivered to me by your secretary under the heading of "L. R. Chapman, Inc., "At Lewisport, Kentucky," and dated December 1, 1949, and ask if that is your record of deliveries to the Owensboro Sewer Pipe Company?

A. Yes, sir.

Mr. Friesen: (To the reporter) Off the record.

(Off the Record Discussion)

63 Q. I'd like to have this marked as Government Exhibit 1.

(Whereupon, Document Received and Marked by the Reporter as Government Exhibit No. 1)"

(The defendant, for purposes of identification, handed the reporter the document previously marked Government Exhibit I for identification, said document being re-identified as Government's Exhibit I.)

Mr. Friesen: (For Deft.) The Government's Exhibit 1, consisting of two pages, was marked by the reporter.

The Court: Any objection to 1?

Mr. Travis: (For Plff.) It has not been offered, but I will have an objection to '49.

64 Q. "Let the record disclose that the formerly described paper was marked Government Exhibit I for identification. I'm handing you Government Exhibit I, Mr. Chapman. Would you explain whether or not all of these [fol. 209] tonnages appearing in the left-hand column under title "Tons," were delivered to the Owensboro Sewer Pipe Company during that year?

A. Yes, they were.

65 Q. And they were delivered from the land that you have described earlier, is that correct?

A. Yes, sir.

66 Q. And the amounts under the column showing at 4.25 per ton . . .

A. (Interposing) That's coal.

Mr. Travis: Now, don't mix up coal.

67 Q. I'm sorry. Under the column at 1.40 Dollars per ton, were deliveries of clay and shale made during the year 1949?

A. Yes, sir; that's what they paid us for our services.

68 Q. And they paid you this plus \$1.00 for the transfer of title to property, is that correct?

A. That was off their own property; the five acres, that was sold for \$50.00.

69 Q. So that this figure of \$862.93 was what they paid you in addition to the \$50.00?

A. Yes, sir.

70 Q. Which was transferred—given to you for transfer of title?

A. (Nods head affirmatively).

71 Q. And was this coal also from that same land?

A. No, sir.

72 Q. I'll ask the reporter to mark this document bearing the date February 1, 1950, as the Government's Exhibit No. II.

(Whereupon, Document Received and Marked by the Reporter as Government Exhibit No. II)"

(The defendant, for purposes of identification, handed the reporter the document previously marked Government Exhibit II for identification, said document being re-identified as Government's Exhibit J.)

[fol. 210] 73 Q. "Mr. Chapman, I hand you what has been marked for identification Government Exhibit II, and ask if these amounts appearing on the column, "Number of pounds," opposite clay invoices, is the number of pounds of clay that you sold to the Owensboro Sewer Pipe Company during the period covered by that document?"

A. That's the number of pounds that I delivered to them, yes, sir.

74 Q. And it was under the same arrangement as the other deliveries, as far as payment and purchase?

A. Yes, sir.

Mr. Friesen: (To the reporter) Off the record.

(Off the Record Discussion)

75 Q. The reporter will mark this the Government's Exhibit III for identification, please.

(Whereupon, Document Received and Marked by the Reporter as Government Exhibit No. III)

Mr. Friesen: (For Deft.) Government's Exhibits 3 and 4 were marked at the time and not offered.

76 Q. "Mr. Chapman, I ask you, or, hand you what has been marked for identification Government Exhibit No. III and ask you if this is the document you have shown us applicable to the year 1951.

A. Yes, sir.

77 Q. Now, have you sold or delivered these—the amounts shown on each of these pages to the Owensboro Sewer Pipe Company from the land transferred as you have previously described?

Mr. Travis: I object to the question unless you are specific about what land you are talking about. There are two parcels involved here.

78 Q. From which of the two parcels was this delivered, Mr. Chapman?

[fol. 211] A. Parcel one.

79 Q. Which is the . . .

Mr. Travis: (Interposing) Five acres.

80 Q. . . five acres . . .

A. (Interposing) Five-acre tract.

81 Q. Transferred for \$50.00?

A. Yes.

82 Q. Now, during the month of June, 1951, what amount of clay was delivered to Owensboro?

A. 532.71 tons.

83 Q. And how much did you charge for this delivery of clay and shale?

A. For stripping and loading and hauling, delivering, I charged them a Dollar and Forty Cents.

84 Q. And what was the total amount?

A. \$745.79.

85 Q. And for the month of July, 1951, will you give us the total tonnage and total cost, please?

A. 1,023.52 tons, and for our services that we charged \$1.40.



86 Q. Per ton?

A. Per ton.

87 Q. And at a total . . .

A. \$1,432.93.

88 Q. And during the month of August, 1951?

A. There was 1,017.26 tons, the same as was last month for services, such as mining and hauling and delivering, \$1,424.16.

89 Q. And during the month of September?

A. 1230.16 tons. For our services they paid us a Dollar Forty cents.

90 Q. Per ton, for a total—

A. (Interposing) Per ton, for \$1,722.22.

91 Q. And during the month of October, 1951, Mr. Chapman?

[fol. 212] A. 1295.03 tons.

92 Q. Just the total figure will be fine.

A. \$1,813.04.

93 Q. And during the month of November, Mr. Chapman?

A. 1506.94 tons, for \$2109.71.

94 Q. And during the month of December, the tonnage and the price?

A. \$1618.46, for \$2265.48.

95 Q. You meant the first figure, as tons?

A. Yes.

Mr. Travis: Instead of dollars.

96 Q. That was 1618.46 tons at 2265.48 Dollars?

A. Right.

97 Q. Mr. Chapman, you have given us the figures off of Government Exhibit No. 3, so I return this for your files. Now, do you also have figures such as this for the year 1952?

A. Yes, we do have.

98 Q. Would you, while you are at it, get out the years '52 and '53, please.

A. '52 and '53?

99 Q. Yes, please.

A. Yes, sir.

100 Q. All right.

(Whereupon, the Witness was Handed Documents by Miss Gabbert)

101 Q. Referring back to the Government's Exhibit 3, were the figures you have given us taken from the books and records of the L. R. Chapman, Inc.?

A. Yes, sir.

102 Q. And you believe them to be accurate figures, is that correct?

A. Yes.

[fol. 213] 103 Q. And they were kept in the ordinary course of the business of the L. R. Chapman, Inc.?

A. Yes, sir.

104 Q. May I see what the secretary has handed you for the year 1952?

A. Yes, sir.

(The Witness Hands Documents to Mr. Friesen)

105 Q. Now, Mr. Chapman, I am handing to the reporter what has been marked 1952 on the front to be marked Government Exhibit 4.

(Whereupon, Document Received and Marked by the Reporter as Government Exhibit No. 4).

106 Q. Mr. Chapman, is this Government Exhibit 4 a record which has been kept in the ordinary course of your business?

A. Yes, sir.

107 Q. Now, would you proceed through there, starting with January, and just read for each month the total tonnage sold and the price at which it was sold or delivered, understanding that I'm talking about the amount that you charged the customer for whatever you did?

A. I can give you the contract price.

Mr. Travis: To which the plaintiff objects for the reason that any figures concerning the year 1952 are not pertinent to any issue in the cause of action before us."

The Court: Well, I will overrule it.

108 Q. "Would you go ahead and read those figures Mr. Chapman? If you will, just start at the back and flip the pages forward, I think, is the total figures you will find. I think that's (indicating) for January.

[fol. 214] A. January 31, '52, 1508.86 tons, \$2112.40. Here is one we had a mechanical error for February 29, 1952, 1420.53 tons, \$1988.74. That is corrected.

109 Q. All right.

A. March 31, '52, 1835.70 tons, \$2569.98. Through April 30, 1295.28 tons, for a total dollars of \$1813.39. This is through May 31, '52, 1020.48 tons, for a total of \$1632.77. This is ending June 30, 1952, 2515.17 tons, for \$4024.27. Through June 31, 1952—

Mr. Travis: (Interrupting) Isn't that July? Didn't you just give June?

A. This is July, I meant to say. Through July 31, 1952, 987.93 tons for \$1580.69. Through August 31, 1952, 1543.93 tons for a total of \$2470.29. There is a mechanical error at the office, we made a mistake of four and a quarter where the price is different.

110 Q. But the figure which you have given us is correct?

A. Yes, this figure here, I'm sure, is correct.

111 Q. All right.

A. This is through September 30, 1952, 2228.03 tons for \$3564.85. This is through October 31, 1952, 1571.87 tons for a total of \$2514.99. Through November 30, 1952, 1604.45 tons for \$2567.12. Through December 31, 1952, 1702.59 tons, for \$2724.14.

112 Q. Now, from what land were you taking that clay and shale during the year 1952?

A. Still from the first tract, the five-acre tract.

113 Q. Was there any distinction made between the clay and shale that was taken? Was it intermixed, or was it mined separately?

A. I don't—can't answer that. I don't know. We mined it the way they told us. I didn't know clay from shale. I don't yet.

114 Q. In your invoice you listed the clay and shale. [fol. 215] Who made that entry on these earlier 1949 invoice records, Government Exhibit 1?

A. That's what they told us they was taking, clay and shale.

115 Q. You say that you don't know the difference between clay and shale?

A. No, sir.

116 Q. Mr. Chapman, to what, or, for what other producers of brick and tile have you mined and delivered clay—

Mr. Travis: (Interrupting) Just a minute.

117 Q. (Continuing)—and shale?

Mr. Travis: Plaintiff objects to the question, unless it's limited as to time."

The Court: Read that question.

(Mr. Friesen read Questions Nos. 116 and 117 to the Court at this time.)

The Court: Overruled. You may answer.

118 Q. "Please answer my question. For what other producers of brick and tile products have you mined and delivered clay?

A. Oh, for what period are you asking me about?

119 Q. During the course of your business of delivering and mining clay and shale.

A. Up to now?

120 Q. Yes, sir.

A. The Owensboro Sewer Pipe, the Murray Tile Company, Owensboro Brick, Rockport Brick, Boonville Brick, and Cannelton Sewer Pipe.

121 Q. During the year, 1951, were you delivering to any other producer of brick and tile?

A. Not to my knowledge.

[fol. 216] 122. Q. When did you start selling or delivering and mining for Rockport Brick?

A. I—

Mr. Travis: (Interrupting) Just a minute. To which the plaintiff objects for the reason that it could not involve the year 1951, since the witness has already testified he delivered only for Owensboro Sewer Pipe Company during that year."

The Court: Overruled. You may answer.

123 Q. "Will you answer the question? /

A. I can't tell you without checking.

124 Q. Would you check, please?

A. Miss Gabbert, will you get me the first invoice on Owensboro Sewer Pipes?

125 Q. Rockport.

A. I mean, Rockport.

126 Q. (To Miss Gabbert) You might look up the same as far as Boonville Brick and Murray Tile, and Cannelton Sewer.

(Whereupon, the Witness is Handed Documents by Miss Gabbard)

A. From my records, Boonville Brick received their first clay on September—in September, 1954.

Let me check these, first. (Witness examining records.)

According to my records, the first work we did for Rockport Brick and Tile was in the month of January 1956.

127 Q. All right. And for Murray?

A. Murray Tile Company, according to my records is December 2nd—no, pardon me, November 30, 1952.

128 Q. And with—was it clay and shale which was mined and delivered by you for each of these organizations that [fol. 217] you have named taken from land which has once been owned by you?

A. Yes.

Mr. Travis: To which the plaintiff objects because the question relates solely for years other than 1951."

Mr. Travis: (For Pltf.) There was the same objection, your Honor.

The Court: Overruled.

129 Q. "Your answer to that question was, yes, Mr. Chapman?

A. Yes, sir.

130 Q. And what was the consideration for the lease or sale of the land to these separate companies, if you know?

A. All—

Mr. Travis: (Interrupting) Renew the same objection."

The Court: Same ruling.

131 Q. "Well, take the Murray Brick Company in 1952.

A. They purchased—

Mr. Travis: (Interruption) Which company is this?

Mr. Friesen: (To Mr. Travis) Murray.

A. They purchased, the best I can remember, it was fourteen acres. It was a rental purchase, which they could



either pay a five-cent royalty, or buy for a fixed sum of money.

132 Q. And what did they choose to do?

A. Pay a royalty.

133 Q. Five-cent royalty?

A. Yes, sir.

134 Q. Did you also obtain a contract at that time to mine and deliver clay and shale?

[fol. 218] A. At the beginning it was verbal, but—yes, there was a contract to produce. We had one.

135 Q. You had a contract to produce?

A. Yes.

136 Q. Without examining your records, Mr. Chapman, do you know approximately how much clay and shale you produced for—in any given year, say in 1952?

Mr. Travis: To which the plaintiff objects for the same reason."

The Court: There will be the same ruling. You may answer.

A: "I would have no idea without—"

137 Q. (Interrupting?) Mr. Stafford totaled several of the documents which you handed us, 1950 through 1954-55, when he was in your office earlier, and to the Owensboro Sewer Pipe Company for 1953—

Mr. Travis: (Interrupting) You've got that in—

138 Q. (Continuing)— he had the figure, 49,384.75 tons at a Dollar-Sixty a ton for a total of \$31,015.58. Do you know if that figure is correct?

A. I do not. It should be.

139 Q. Mr. Travis, rather than going through and putting these on month by month and totaling them up later, would you concede or stipulate that these are the figures which Mr. Stafford totaled from these papers?

Mr. Travis: What year are you talking about?

Mr. Friesen: For 1953.

Mr. Travis: Yes; he's already got the figures in anyway, whatever the total is.

Mr. Friesen: Not for '53; '52 is the last year we read. I believe.

Mr. Travis: Oh, you didn't read '53?

Mr. Friesen: I thought I'd save some time.

[fol. 219] Mr. Travis: I will stipulate Mr. Stafford's totals, with the objection as to the admissibility.

140 Q. Now, you have testified—

Mr. Travis: (Interrupting) Did you give them in the record?

Mr. Friesen: I think I read them.

Mr. Travis: Oh, did you read that?

Mr. Friesen: Yes.

Mr. Travis: Okay.

141 Q. Mr. Chapman, you have testified that you might have delivered clay and shale to the Cannelton Sewer Pipe Company who is the plaintiff in this suit. Do you recall when you first delivered to them?

A. Yeah.

142 Q. When was that?

A. I couldn't—I don't know if I can remember the exact date, but they was some tests loads that started in the fall of '56.

143 Q. So it was in the fall of '56, or later, that you started delivering clay and shale to them, is that correct?

A. Well, the first we delivered to my recollection was just for test purposes. It would just be a load now and maybe another week another load, just—some of it was just taken in sacks, and so forth. That started in the fall of '56.

144 Q. Well, when did you start delivering to them regularly?

A. On about January 17, '57.

145 Q. Now, have you delivered to them relatively continuously since that time?

A. Yes, sir.

146 Q. Do you have a record of how much you have delivered to them since January of '57?

A. It isn't totaled up.

[fol. 220] 147 Q. Do you have a record to show by month, the totals?

A. When—they—we keep it by week.

148 Q. Well, could you produce that, please?

A. Miss Gabbert, would you find me Cannelton Sewer Pipe?

Mr. Friesen: (To the reporter) Off the record.

(Off the Record Discussion)

Mr. Friesen: Counsel for the plaintiff and defendant stipulated that since January, of 1957, the plaintiff has obtained all of its supply of clay and shale from the mining and delivery of L. R. Chapman, Inc.

149 Q. Mr. Chapman, how far from the other deposits which you have mined and delivered for Owensboro is the present deposit which you mine and deliver from Cannelton?

A. Do you want that in the nearest way, or roadway?

150 Q. Well, possibly—actually, as the crow flies would be fine.

A. Mile and a half.

151 Q. Has Cannelton obtained an interest in this land which you are mining and delivering from?

A. Well,—

Mr. Travis: (Interrupting) I want to object to all these questions that are related to the year 1957, without repeating the objection.

Mr. Friesen: All right. I understand that you have a continuing objection against any year except—

Mr. Travis: (Interrupting) Other than 1951.

Mr. Friesen: (Continuing) —except 1951."

The Court: Well, I will overrule it. You may answer.

A. "I don't understand your question.

[fol. 221] 152 Q. Do they have a lease, or have you transferred the title in this land?

A. Yes, sir; they have a lease.

153 Q. And what was the consideration for the lease, if you recall?

A. There was One Dollar, if I remember, plus a Ten-Cent royalty.

154 Q. Did you also get a contract to mine and deliver?

A. Yes, I do at this time.

155 Q. Mr. Chapman, I believe you stated that the clay and shale which you mine and deliver is not a result of your strip mining of coal for profit.

A. It is not.

156 Q. Who developed this particular land in the sense of examining it to determine whether it had clay and shale in it and preparing it for mining and delivery?

A. The various companies that I do business with.

157 Q. And when you say they did it, did they pay you for doing it, or did they come out and strip off the overburden, and that sort of thing?

A. In some instances they paid me for doing it, like dig a hole where they tell me to and they would take samples. In other instances they did it by core drilling at their own expense.

158 Q. Did you do all of the removal of the over-burden?

A. Yes, by the hour.

159 Q. Did you do the removal of any coal-like deposit that is on top of it, the clay and shale?

A. I don't understand that question.

160 Q. Did you do all of the work in removing the overburden clear down to the clay and shale?

A. In some instances, yes.

[fol. 222] 161 Q. And who did it in other instances, and in which instances are you talking about?

A. Well, in some instances I know of where they have dug in by hand with their own—own help. I know of other times where they had drilled.

162 Q. Now, are you—I'm just talking about preparing it for actual mass production mining. I'm not talking about the investigation work.

A. Well, I did the stripping.

163 Q. Mr. Chapman, you originally stated you were in the business of farming, I believe, and strip mining coal. Would you now add to your business that you are in the business of mining and delivering clay and shale?

A. We don't class it that way. It's—we keep it under the category of contracting. We're in that business now more than—

164 Q. (Interrupting) You are in the contracting business?

A. Yes, sir.

165 Q. And one of the types of contracting you do is strip mining and delivering clay and shale?

A. Yes, we dig ponds, we build roads. We have equip-

ment that we do earth movement work on a contract basis.

166 Q. I have no further questions at this time, Mr. Travis.

Mr. Travis: Do you want to offer any of those exhibits?

Mr. Friesen: Yes. I intend to offer Government Exhibits I and J.

Mr. Friesen: (For Deft.) And which they are now I and J.

(Government's Exhibits I and J were offered in evidence at this time by Mr. Friesen.)

[fol. 223] The Court: Any objection?

Mr. Travis: To which the plaintiff objects for the reason that said exhibits refer to the years 1949 and 1950 which are not in issue in this case."

The Court: Overruled. I and J are admitted and read, and exhibited in evidence.

(Government's Exhibits I and J are admitted into the evidence, and made a part of the record in this case, said exhibits being in the words and figures following, to-wit:)

(Here Insert.)

Cross-examination.

By Mr. Howard P. Travis:

Mr. Travis: Mr. Chapman, your business is not limited to mining and hauling clay?

Mr. Chapman: No, sir.

167 Q. Do you also haul dirt and other things like that in connection with your contracting business?

A. Yes, sir.

168 Q. You are prepared to haul almost anything that comes out of the earth, are you not?

A. That's right.

169 Q. In reading the figures for 1951 and 1952 of your monthly invoices for hauling clay to the Owensboro Sewer Pipe Company, I will ask you if on each of those invoices



there is not stated at the top a sentence similar to the following:

"List of clay invoices hauled to Owensboro Sewer Pipe Company for the month ending — by L. R. Chapman, Inc."?

A. Yes, sir.

[fok 224] 170 Q. Now, are you familiar in general, Mr. Chapman, with the producers in the general area of Lewisport, Kentucky, of brick, sewer pipe, and other vitrified products, clay products?

A. Yes.

171 Q. Is it true that the production of vitrified products in this area of Kentucky is limited to Hancock and Graves counties?

A. I couldn't answer that question; I don't know.

172 Q. Are you familiar with all of the companies in this general area that are producing vitrified products of any kind?

A. Yes, sir.

173 Q. Are the—are those companies limited to the ones which have been talked about in your testimony?

A. I don't know.

174 Q. You don't know whether there is any others producing brick and tile in this area?

A. Not to my knowledge, there isn't.

175 Q. There isn't. During 1951, did you not deliver for, mine for, or sell to,—(To the Reporter) Strike out "sell to" in that question, please—any producer of vitrified products other than Owensboro Sewer Pipe Company?

A. Not to my knowledge.

176 Q. And the other companies to which you have testified, Owensboro Brick, Rockport Brick, Boonville Brick, and Cannelton Sewer Pipe Company, so far as you know during 1951 obtained their clay from sources other than yourself?

A. Not that I know of.

177 Q. Did they get it from you?

A. No.

178 Q. Is the tract of land from which you have been delivering clay to Cannelton Sewer Pipe Company, since January, 1957, completely separated from the tract which

[fol. 225] you have been delivering to these other companies?

A. Yes sir.

179 Q. It's a separate mine and vein entirely, is that so?

A. I can't answer to the vein. But its—

180 Q. (Interrupting) A separate piece of real estate?

A. It's a separate piece of real estate, although it joins on one corner.

181 Q. But it had never been mined before you started delivering for Cannelton?

A. No, sir.

182 Q. Do you know anyone in this area near Lewisport, Kentucky, who mines clay and sells it at a ton price in its raw form?

A. No, sir.

183 Q. Have you sold any clay to any producers of vitrified products?

A. I have not.

184 Q. How long have you owned land in this area of Kentucky?

A. Since—the majority of it, since 1946.

185 Q. And have you lived and operated around here ever since that time?

A. Yes, sir.

186 Q. When Mr. Friesen or myself said words to the effect that you own land, is that you personally or L. R. Chapman, Inc., that owns this land?

A. Both.

187 Q. Both. That's all.

Mr. Friesen: Do you want to wait a moment? She's (indicating Miss Gabbert) digging out an invoice for me, and I just want to look at it.

Mr. Travis: All right.

[fol. 226] Redirect examination.

By Mr. Ernest C. Friesen, Jr.:

Mr. Friesen: Mr. Chapman, you testified that all of the mining took place on land which you had formerly owned or still did have an interest in?

Mr. Chapman: Yes.

188 Q. How long prior to your beginning to mine and deliver for each of these persons did you either transfer title or lease the lands to those individuals?

A. Well, . . .

189 Q. Did it amount to a number of months or years?

A. Now, how's that again?

190 Q. You testified that you once owned all of this land.

A. Yes.

191 Q. And that some of it you still do own an economic, or some kind of an interest in it. You either lease it or you own an undivided interest in it. That implies that there were leases or transfers of some kind. I'm asking how long prior to your starting to mine and deliver did you make these leases or transfers. Was it a number of months or a number of years?

A. In some instances it could be months; some instances it could be just a short time. But they was gentlemen's agreements.

192 Q. What did this gentlemen's agreement consist of?

A. It was a general conversation of our contract.

193 Q. You are stating that you had a contract to lease and to mine and deliver made prior to your commencing mining and delivering, is that correct?

A. I don't understand how—what you mean.

[fol. 227] 194 Q. Do you know what I mean by a lease or transfer, do you not?

A. Yes, sir.

195 Q. I'm simply asking do you—did you make the lease, for instance in the Cannelton case, a month before you started mining and delivering, or a year before you started mining and delivering, or a week before you started mining and delivering?

A. Well, they was several weeks involved in negotiating it.

196 Q. Several weeks?

A. Yes.

197 Q. Not months?

A. Well, it could be as much as two or three months.

198 Q. But it didn't amount to a year?

A. No.

199 Q. Now, would any case that you have stated in which you have mined and delivered from land which you

once owned, that amounted to as much as a year in arranging your mining and delivery?

A. No.

200 Q. Then it was generally one complete transaction, wasn't it?

A. Generally, yes.

201 Q. The sale or lease and the agreement to mine and deliver was one bundle of mutual understandings between you?

A. Yes.

202 Q. It had to be put—

A. (Interrupting) It had to be put together, and after they did—they didn't seem to want to do the prospecting or the sampling until they were sure they could get either a lease or a deed.

203 Q. Would you have sold the land for Ten Dollars an acre if you hadn't gotten a contract with Owensboro to mine and deliver?

[fol. 228] A. Might have.

204 Q. Would you have sold the other tract for one Dollar if you hadn't gotten an agreement to mine and deliver?

A. I doubt so.

205 Q. I have asked the secretary to obtain one or two of the invoices to Owensboro for 1951, and depending on how they come up, I may have another question.

A. What do you mean, invoices?

206 Q. Those list an invoice number, Mr. Chapman. I thought you might still have them.

(Off the Record Discussion)

207 Q. Mr. Chapman, how long have you been testing clay in your own operation here?

A. I have never tested any clay.

208 Q. This furnace that you have here and the pyrometric cone that you have set up opposite the furnace, that is nothing that you have done?

A. That was did by a ceramic engineer.

209 Q. You bought the furnace and had the engineer come in, is that correct?

A. No. He bought the furnace and does it on his own.

210 Q. Does he report to you what he finds?

A. Not necessarily. He tell me once in awhile, which I don't understand what he's talking about, but—

211 Q. (Interrupting) Does he take any clay and shale from your property?

A. Well, not a hundred per cent. He does take clay and shale from there, but he brings it in from everywhere.

212 Q. I don't have any other questions.

Mr. Travis: That's all.

(Witness Excused)

[fol. 229] Mr. Friesen: (For Deft.) Your Honor, I anticipated closing with that. One thing has been raised by the plaintiff's testimony, the officers of the plaintiff, which I should like to clear up.

It was testified that the future years, or, later years in suit on this issue had been closed by the Government, and the taxpayer; and I use the word "closed" only in the sense they agreed not to go to the Tax Court on the subject at \$7.00 a ton. Mr. Stafford is familiar with the way that figure is computed, and I would call him to the stand to explain it.

JOHN C. STAFFORD, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions By Mr. Friesen:

1 Q. Give the reporter your full name.

A. John C. Stafford.

2 Q. And how are you employed?

A. As an engineer with the Internal Revenue Service.

3 Q. And with what office are you connected?

A. Cleveland, Ohio.

4 Q. In the course of your employment in that office, have you had occasion to survey the market in Ohio for the sales of clay?

A. I have made a survey.

5 Q. And in the course of that survey, have you found that underclays of coal are sold in a ground and screened form?



A. I have.

6 Q. Do you know the average price which those sold?

A. These prices vary, depending upon the uses and the extent they are ground, and, too, the conveniences, whether [fol. 230] they are packaged, or shipped, and so forth.

7 Q. Can you give some typical examples of those?

Mr. Travis: (For Plff.) Mr. Friesen, rather than objecting, because I have no objection to his testifying about Ohio, if it is not going to be used as part of the marketability of Cannelton, Indiana. I don't think that is the purpose of your examination of this witness, but I would like it understood.

Mr. Friesen: (For Deft.) Let me tie it in with this question.

8 Q. (By Mr. Friesen) Do you know if the District Director of Indiana made inquiry of the District Director of Cleveland as to how they were settling or closing the clay cases dealing with sewer pipe?

The Court: Yes or no.

A. Yes, they did.

9 Q. (By Mr. Friesen) Do you know on what basis the Cleveland Office reported to the Indianapolis Office that they were closing or settling these cases?

A. Yes, sir.

10 Q. And what was that report?

A. (Witness referring to memoranda). It was an office memorandum directed to the Appellate Division, of the Cleveland Office, which was in reply to an inquiry from the Appellate Division of the Indianapolis Office, dated October 18, 1955.

11 Q. And what explanation did they give to the office here in Indianapolis?

A. It was stated that the Cleveland Office, the engineering statute was settling cases involving sewer pipe for a value of \$7.00 per ton of ground and screened fire clay in accordance with Revenue Ruling 54-109.

12 Q. And do you know how the Cleveland Office arrived at that figure of \$7.00?

[fol. 231] A. Yes, sir.

13 Q. Was that the result of your survey?

A. Yes.

14 Q. And is it common practice to sell ground and screened fire clay in the Cleveland Area?

A. It is.

15 Q. And what company or companies do you refer to that sold ground and screened fire clay in that area which had a price of around \$7.00 per ton.

A. The companies I will mention here, that were used, were actually in the Portsmouth, Ohio Area: the Cambria Clay Products Company, the Oak Hill Fire Brick Company, Pyro Refractories Company, Davis Fire Brick Company, Cedar Heights Clay Company. I have one—That's all.

16 Q. There were actual sales of ground and screened fire clay with the basis of your settlement?

A. That's right.

Mr. Friesen: (For Deft.) I have no further questions.

Cross-examination.

Questions By Mr. Travis:

17 Q. Mr. Stafford, you are aware that other Revenue Districts of the Internal Revenue Service have settled on different prices per ton as the value of fire clay, have they not?

A. Yes.

18 Q. Do you know how high they did go?

A. I don't know except from hearsay.

19 Q. Something over \$10.00, wasn't it?

A. I have heard of some.

20 Q. California went something like \$26.00, is that right?

A. I don't know as to that.

[fol. 232] 21 Q. I was told, Mr. Stafford, by a gentleman who was in conference with you in your office in Cleveland at one time, about this \$7.00 per ton basis, you had indicated a willingness to go as high as \$10.00, if you settle cases finally without going to court on them. Is that true?

A. Not exactly. The \$10.00 figure you refer to is for a different material. We have values ranging from \$4.00 to \$10.00, and that was based upon the type of material and the product to be used.

Mr. Travis: (For Pltf.) That's all . . . Just a second. That's all.

Mr. Friesen: (For Deft.) I have no further questions.  
(Witness Excused)

COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Friesen: (For Deft.) I believe, your Honor, that subject to our opportunity to rebut that which may be presented by the plaintiff in the future, that the Government rests its recitation of facts.

The Court: You don't mean to state it exactly that way. Your agreement was you had a right to offer evidence in response, before we get to rebuttal, to this expert witness; then after we finish that, both sides will have their rebuttal.

Mr. Travis: (For Pltf.) Your Honor, may I have a very short conference with my clients before we conclude?

(At This Time the Government, Defendant in This Cause, Rests its Case Subject to Agreement as Made Between Counsel for the Plaintiff and Counsel for the Defendant.)

The Court: We will have a few minutes' recess.

[fol. 233] (Whereupon the Court was recess at 3:55 p.m., and reconvened at 4:18 p.m., at which time the following proceedings were had:)

Mr. Travis: (For Pltf.) If your Honor please, the plaintiff has, through neglect, failed to identify the two pieces of clay and shale that were exhibited yesterday, and identified by the witness.

(The plaintiff, for purposes of identification, handed the reporter certain objects for marking, and which were by said reporter marked Plaintiff's Exhibits Nos. 19 and 20.)

Mr. Travis: (For Pltf.) The plaintiff now offers in evidence Exhibits No. 19, which is the sample of clay identified by Mr. Eugene Clemens as fire clay, and Plaintiff's Exhibit No. 20, which is the clay identified by the same witness as shale.

(Plaintiff's Exhibits Nos. 19 and 20 were offered in evidence at this time by Mr. Travis.)

Mr. Friesen: (For Deft.) No objection, your Honor.

The Court: There being no objection, 19 and 20, then, are admitted and exhibited in evidence.

(Plaintiff's Exhibits Nos. 19 and 20 are admitted in evidence, and made a part of the record in this case, said exhibits being in the words and figures following, to-wit:)

(Here Insert.)

Mr. Travis: (For Plt.) The plaintiff now rests its case, and withdraws its request for an opportunity to present Dr. Everhart as a witness.

(At This Time the Plaintiff Rests.)

Mr. Friesen: (For Deft.) Your Honor, I should like to consider the possibility of consulting an expert. I had [fol. 234] counted on Dr. Everhart's being here, and having consulted with him, know somewhat the nature of his testimony. I admit this surprises me, and probably the Government will not want to call him or another expert; but some short reasonable time to consider the problem . . .

The Court: (Interposing) Would you want to recess here and collaborate on the matter a little bit? It is only four-thirty.

Mr. Friesen: (For Deft.) Well.

The Court: The Court, too, is surprised.

Mr. Friesen: (For Deft.) Dr. Everhart is a distinguished ceramist, and Dr. Murray is a mineralogist, and the problem of what a refractory or refractory brick is may be relevant to what fire clay is, whether this material is fire clay.

Mr. Travis: (For Plt.) Your Honor, our reason is I might say, the evidence which we intended to produce from Dr. Everhart is nothing but cumulative of the testimony of Dr. Haydn Murray, an expert, and Mr. Eugene Clemens, another ceramic expert; so we just decided the Court has been advised sufficiently by those two what our position is on the matter, and, as I say, Dr. Everhart's testimony would just add more to the same.

Mr. Friesen: (For Deft.) May I ask the Court if it would like to have briefs summarizing the terms and positions we have taken here?

The Court: Yes. I would be in no position to decide the matter today, even if both sides rest.

Mr. Friesen: (For Deft.) The safe thing for me to say is say I would like to call an expert and withdraw my intention some later time. I feel I need to review my notes more extensively than right now. I would like to see what is in evidence.

The Court: In view of the arrangement that was made, [fol. 235] I assume that it would be taking advantage of you if you could not resolve the matter today.

Mr. Friesen: (For Deft.) I do not intend to right now. The way I feel now I do not think it is necessary, but I would

The Court: (Interposing) Why don't we do it this way: Why don't you rest today in trying the case before the Court, and if you believe, after looking this matter over carefully, that you do need this expert or some expert, that you file a request to re-open the case, and we limit the time. How would that be?

Mr. Friesen: (For Deft.) Under those circumstances the Government rests.

(At This Time the Defendant Rests.)

The Court: All right. And the Court would give you—How much time do you think would be a reasonable time for you to move and re-open the case?

Mr. Friesen: (For Deft.) Within 10 days would be satisfactory.

The Court: Let's see, could you make it quicker than that, without my going into a half-hour's explanation here of my problem?

Mr. Friesen: (For Deft.) I have a case to try Friday in Omaha, and Monday in St. Joe, Missouri.

The Court: This is Wednesday.

Mr. Friesen: (For Deft.) A week from today, sir.

The Court: I say this is Wednesday. I wonder if we could not say five days.

Mr. Friesen: (For Deft.) All right, your Honor.

The Court: I appreciate your cooperation on that, meaning that I will be able to dispose of your case before summer, but 10 days may break my back.

Now, the Court would appreciate the use of the transcript here. Do counsel intend to order transcripts?



[fol. 236] Mr. Travis (For Pltf.) I have ordered about four, I think.

Mr. Friesen: (For Deft.) I ordered a copy. I would be glad to share the cost of the Court's.

The Court: Counsel could proceed now on some of the work on your briefs, I assume.

Mr. Travis: (For Pltf.) I am afraid, your Honor, it will be difficult until we get the transcript.

The Court: How much time do you want to file your brief in support?

Mr. Travis: (For Pltf.) I would like to have 30 days.

Mr. Friesen: (For Deft.) Two weeks after I received a copy of his brief. I can have most of the work done. We write our own briefs.

Mr. Travis: (For Pltf.) I can get it in faster . . .

Mr. Friesen: (Interposing) We are on the road a great deal. If he gets it in in two weeks, I would like to have two weeks after that.

The Court: He is saying 30 days, the plaintiff is. The Court goes on vacation July 1, gentlemen, and it looks like your briefing time will just about run out and everything will be ready for me when I am to go on vacation. The judicial Council insists upon deciding a case 30 days after it is submitted to me. The last geological case involving oil, turned out to be a summertime project for me.

Mr. Friesen: (For Deft.) May I put it this way: I would like half the time Mr. Travis has.

Mr. Travis: (For Pltf.) I think, Judge, that would be before the end of May at the longest.

The Court: March 31 I leave here, and I have a calendar of 35 cases in Terre Haute, and I leave there and go to Evansville, and I have another calendar of 35 cases; then I go to New Albany. I will be back here the first of June, and we start an income tax fraud case for the remaining three weeks, and that will end up the first of July. I am [fol. 237] just loaded between now and then.

Mr. Travis: (For Pltf.) As I compute it, if I have 30 days from March 24, and he had 15, it would be early in May that the time would run out. . . . Let me shorten it to 21 days.

The Court: You see, after you go to work you are more conversant with your research; I have to do some digging.

Mr. Travis: (For Pltf.) I think a good deal of our briefing work is done.

The Court: We will say three weeks from the date the transcript is filed in the Clerk's Office. And thereafter 10 days, and your reply brief, how long, Howard?

Mr. Travis (For Pltf.) Ten days.

The Court: Then the Court would request you supply findings of fact and conclusions of law on both sides, and an entry you think it might be.

Anything further?

Mr. Travis: (For Pltf.) I believe not.

The Court: If not, we will stand adjourned.

(Whereupon that was all of the proceedings had in the above cause, and the Court was adjourned at 4:25 o'clock p.m.)

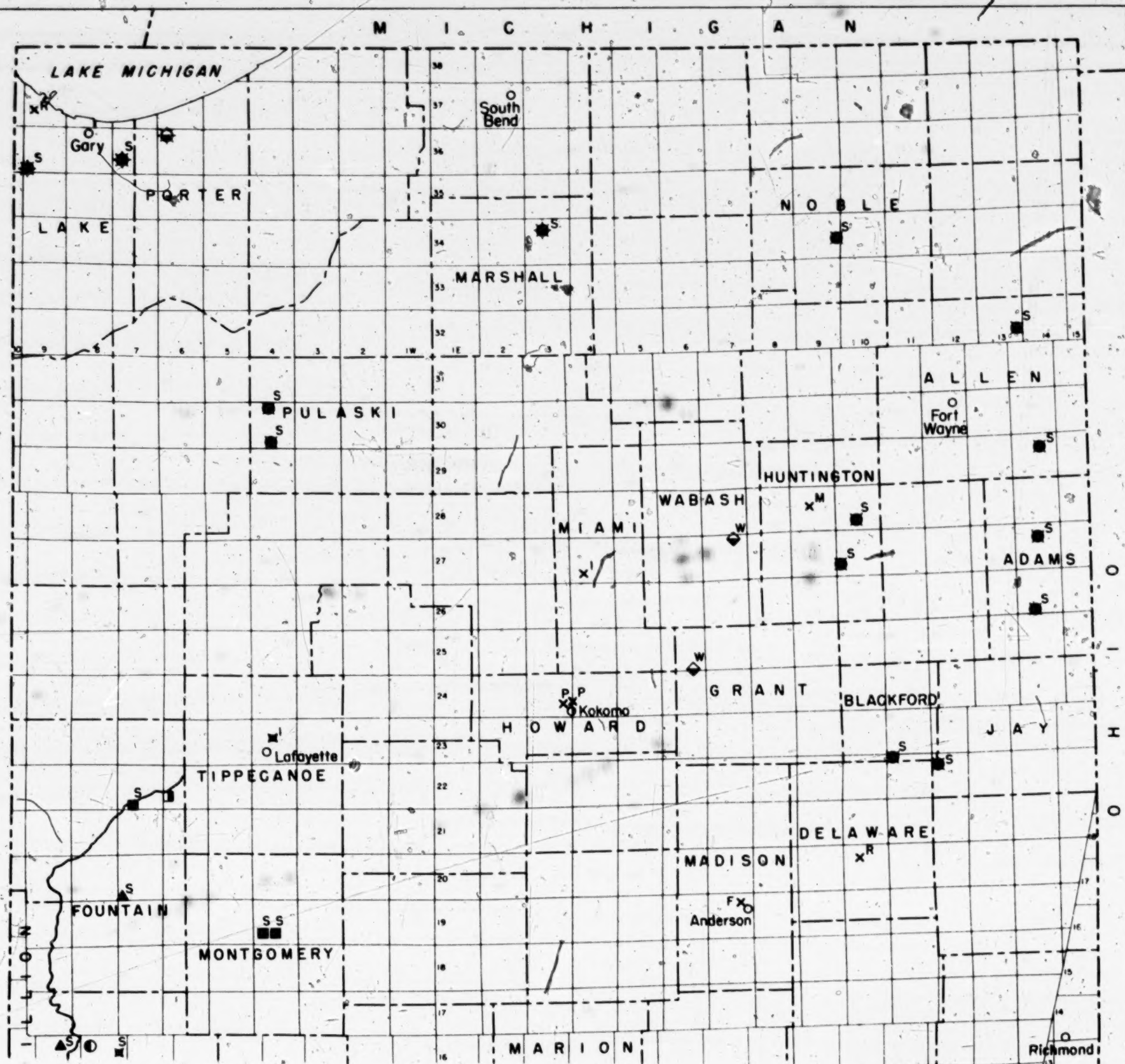
[fol. 238] Reporter's Certificate Omitted in Printing

INDIANA DEPARTMENT OF CONSERVATION  
GEOLOGICAL SURVEY

INDUSTRIAL MINERALS ATLAS MAP NO. 1

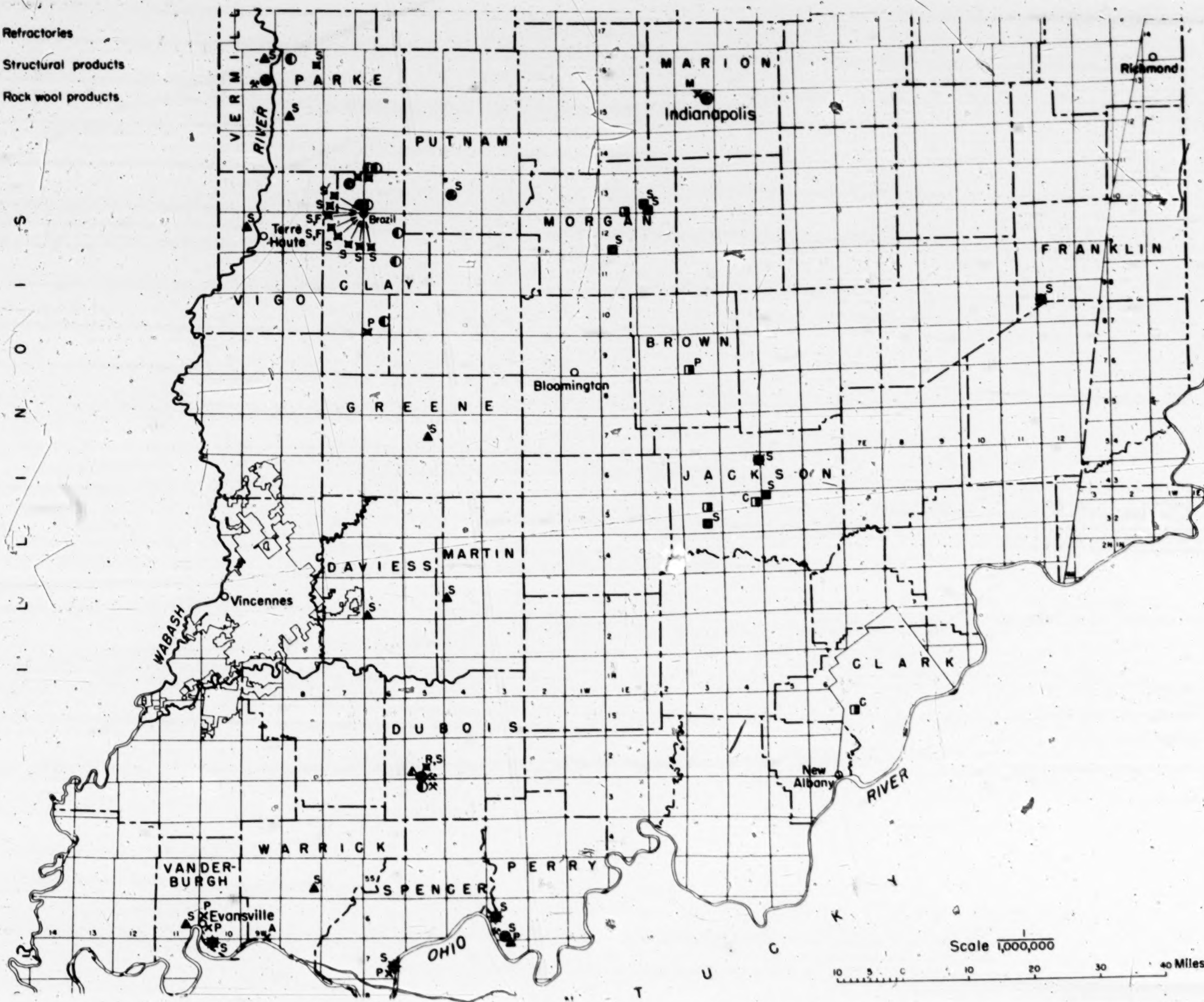
## EXPLANATION

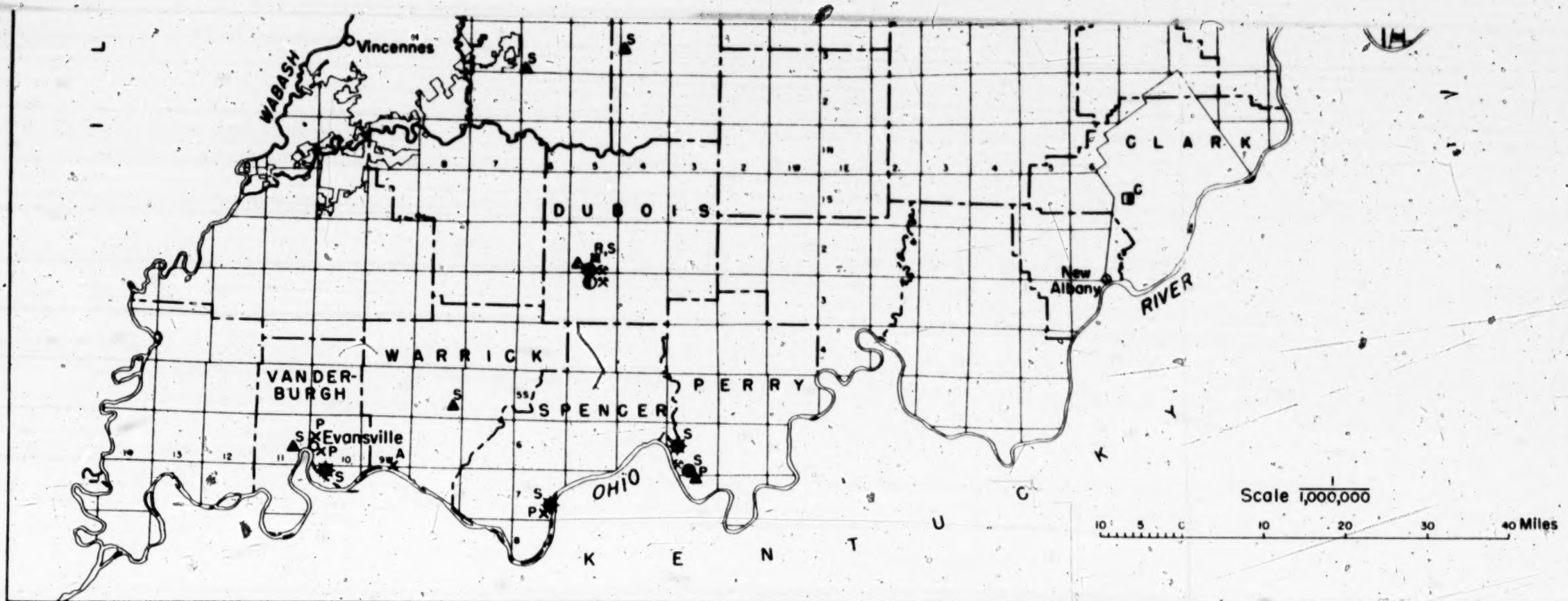
- Pleistocene clay till pit and ceramic plant
- ★ Pleistocene water-laid clay pit
- Pleistocene water-laid clay pit and ceramic plant
- Pennsylvanian clay pit
- Pennsylvanian clay pit and ceramic plant
- ▲ Pennsylvanian shale pit
- ▲ Pennsylvanian shale pit and ceramic plant
- Pennsylvanian clay and shale pit
- Pennsylvanian clay and shale pit and ceramic plant
- Mississippian shale pit
- Mississippian shale pit and ceramic plant
- ◆ Silurian shale pit
- Ceramic plant
- × Ceramic plant not using Indiana materials
- ★ Underground mine
- A Art works
- C Cement
- F Facing tile products
- I Insulator products
- M Modeling clay products
- P Pottery products
- R Refractories
- S Structural products





- R Refractories
- S Structural products
- W Rock wool products





Base from Map of Indiana, 1950 edition, published by U. S. Geological Survey. Minor revisions and additions made from Indiana Department of Conservation, Geological Survey, county base maps.

# MAP SHOWING LOCATION OF CLAY AND SHALE PITS AND CERAMIC PLANTS IN INDIANA

Compiled by H. H. Murray  
June 1952



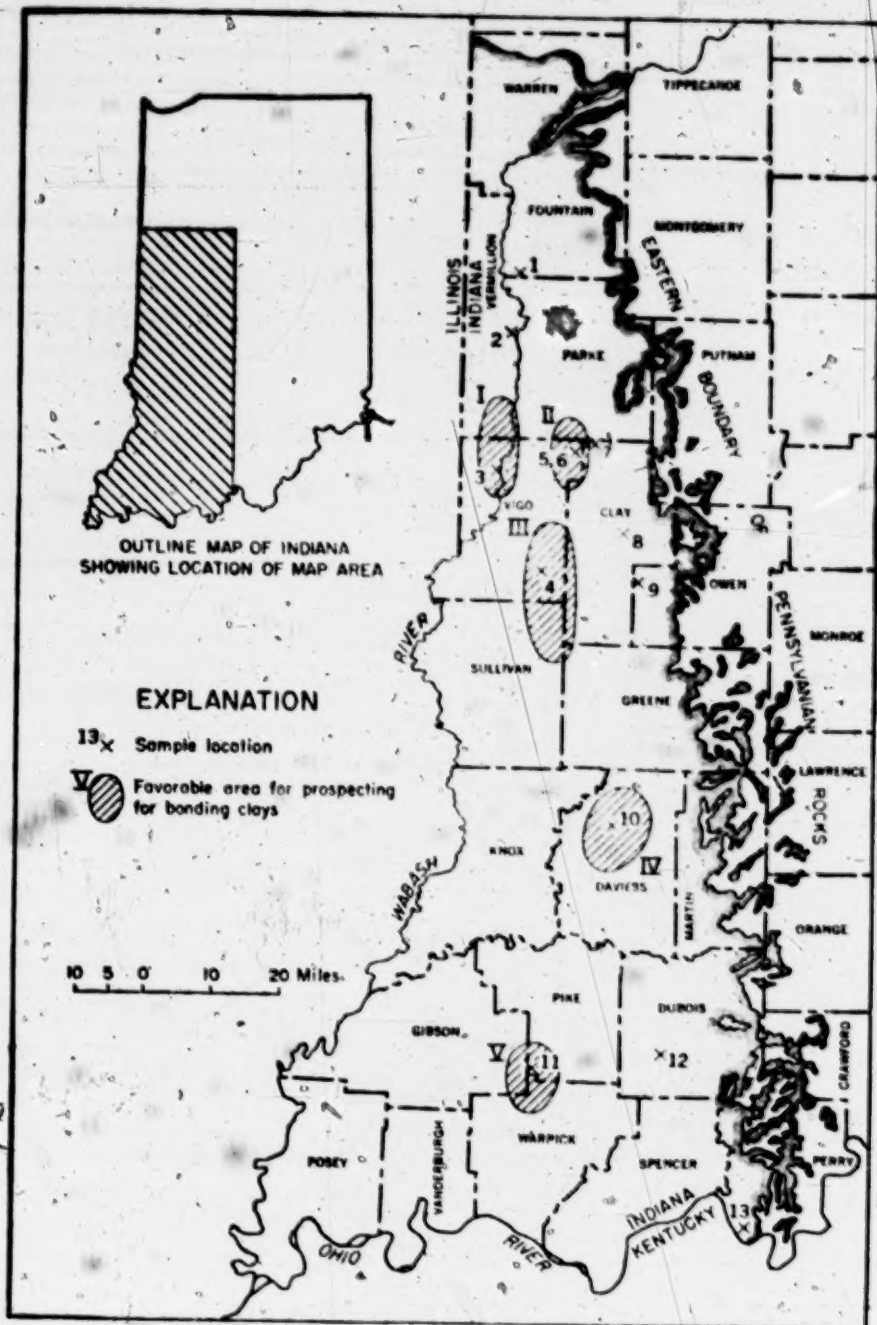


Figure 1. Map of southwestern Indiana showing sample locations, Pennsylvania bedrock, and five favorable areas for prospecting for bonding clays.

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[fol. 241]

GOVERNMENT'S EXHIBIT A

Directory of Producers and Consumers of Clay and Shale  
in Indiana

By Haydn H. Murray

Indiana Department of Conservation  
Geological Survey  
Directory No. 3

1955

[fol. 242]

STATE OF INDIANA  
George N. Craig, Governor

DEPARTMENT OF CONSERVATION  
Harley G. Hook, Director

GEOLOGICAL SURVEY  
Charles F. Deiss, State Geologist  
Bloomington

Directory No. 3

DIRECTORY OF PRODUCERS AND CONSUMERS OF CLAY AND SHALE  
IN INDIANA

By Haydn H. Murray



Printed by authority of the state of Indiana

BLOOMINGTON, INDIANA

February 1955

For sale by Geological Survey, Indiana Department of  
Conservation, Bloomington, Indiana

Price \$ .25

[fol. 243]. **SCIENTIFIC AND TECHNICAL STAFF OF THE GEOLOGICAL SURVEY**

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**John B. Patton, Principal Geologist**  
**Bernice M. Banfill, Administrative Assistant to the State Geologist**  
**Mary Beth Fox, Mineral Statistician**

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**G. K. Guennel, Paleobotanist**  
**S. A. Friedman, Geologist**  
**Henry H. Gray, Geologist**  
**Harold C. Hutchison, Geologist**

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**Maynard E. Collier, Chemist**  
**Louis V. Miller, Coal Chemist**  
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**Judson Mead, Research Advisor**  
**Robert F. Blakely, Geophysicist**  
**Charles S. Miller, Instrument Maker**  
**Joseph F. Whaley, Geophysicist**  
**Raymond Robinson, Driller**  
**Edward D. McKinney, Driller's Assistant**  
**Arthur W. Aynes, Geophysics Technician**

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**[fol. 244] Industrial Minerals Section**

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**Wayne M. Bundy, Petrographer**  
**Seymour S. Greenberg, Petrographer**  
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**Arthur P. Pinsak, Geologist**  
**John M. Smith, Geologist**  
**Ned M. Smith, Geologist**  
**Ross Hickam, Preparator**

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**Jack V. Sears, Draftsman**  
**George R. Ringer, Photographer**

**Introduction****Nomenclature and stratigraphy****Production and uses****Producers and consumers of clay and shale****Producers and consumers of clay and shale listed by  
counties**

Adams County

Allen County

Blackford County

Clark County

Clay County

Daviess County

Delaware County

Dubois County

Fountain County

Franklin County

Greene County

Howard County

Huntington County

Jackson County

Jay County

Lake County

Lawrence County

[fol. 246] Madison County

Marion County

Marshall County

Martin County

Miami County

Montgomery County

Morgan County

Noble County

Owen County

Parke County

Perry County

Porter County

Pulaski County

Putnam County

Spencer County

Tippecanoe County



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 Vermillion County  
 Vigo County  
 Warrick County  
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Figure

1. Generalized stratigraphic column of Pennsylvanian formations in west-central Indiana
2. Generalized bedrock map of Indiana
3. Graph showing annual production of underclay in Indiana, 1938-1952
4. Graph showing annual production of shale and glacial clay in Indiana, 1938-1952

[fol. 248] Directory of Producers and Consumers of Clay  
and Shale in Indiana

By Haydn H. Murray

INTRODUCTION

This directory is a revision of the section on clays and shales in Directory No. 1, Directory of mineral raw materials, exclusive of oil and gas, in Indiana (Callaghan and Ecker, 1948). In Directory No. 1, 30 operations which are no longer active are listed and 32 active operations are not listed. A directory of clays and shales is needed by producers and consumers to aid in evaluating a particular operation. Information concerning production of underclay and shale by coal companies is given in Directory No. 2, Directory of coal producers in Indiana (Wier, 1951). Two earlier publications, the first by Blatchley (1904) and the second by Whitlatch (1933), described the clay industry in Indiana.

In preparing this directory all clay and shale producers and consumers except foundries have been visited personally since 1950. (See plate 1 for a map of Indiana showing the location of producers and consumers of clay and shale.) During 1954, data sheets containing pertinent information about each operation were sent to plants and mines for checking. The author expresses his thanks to the owners, superintendents, and managers for their cooperation in checking and returning the information. Mr. John M. Smith, geologist in the clay mineralogy laboratory of the Indiana Geological Survey, aided in obtaining and checking the data.

NOMENCLATURE AND STRATIGRAPHY

In general, clays used commercially in Indiana can be classified under one of three types: (1) underclays, (2) shales, and (3) glacial materials.

Underclays are clays lying immediately beneath coal beds of Pennsylvanian age (fig. 1). Refractory underclays are called fireclays in the ceramic industry. Underclays are fine-grained, gray, dense, plastic, and massive and are

composed essentially of hydrous aluminum silicate minerals.

Most underclays have a higher  $\text{Al}_2\text{O}_3$  content and a lower  $\text{Fe}_2\text{O}_3$  content than other ceramic raw materials found in Indiana. Mineralogically underclays contain a relatively high ratio of kaolinite  $\{(\text{OH})_4\text{Al}_2\text{Si}_2\text{O}_{10}\}$  to illite  $\{(\text{OH})_4\text{K}(\text{Mg}, \text{Mg}_2\text{Al}_2\text{Fe})_2(\text{Si}_3, \text{Al})_2\text{O}_{20}\}$  and chlorite  $\{(\text{OH})_4(\text{Si}, \text{Al})_2(\text{Mg}, \text{Fe})_2\text{O}_{20}\text{Mg}_2\text{Al}_2(\text{OH})_{12}\}$ . Underclays generally are more refractory and fire to a lighter color than shales and glacial clays. The range of temperatures over which most

[fol. 249]

SYSTEM	SERIES			FORMATION	MEMBER
	MID-CONTINENT	APPALACHIAN			
PENNSYLVANIAN	MISSOURI	CONEMAUGH		Merom sandstone 30-70 ft.	
				Ditney formation 1-35 ft.	
				West Franklin limestone 2-20 ft.	
					Hayden Branch Murphy's Bluff sandstone Vigo limestone
		ALLEGHENY		Shelburn formation 210-300 ft.	Maria Creek limestone Busseron sandstone
	DES MOINES			Dugger formation 90-120 ft.	Coal VII Providence limestone (Universal) Coal VI
				Petersburg formation 90-120 ft.	Alum Cave limestone Coal V (Petersburg) Coal IVa
				Linton formation 40-60 ft.	Coal IV (Linton) Coal IIIa
				Staunton formation 50-70 ft.	Coal III (Seelyville)
	ATOKA	POTTSVILLE		Brazil formation 75-90 ft.	Coal 2 (Silverwood) Minshall limestone Minshall coal Upper Black coal Lower Black coal
	MORROW			Mansfield formation 150-300 ft.	
MISSISSIPPIAN		CHESTER		Cypress sandstone 30 ft.	

Figure 1. Generalized stratigraphic column of Pennsylvanian formations in west-central Indiana

Compiled by C.E. Wier

[fol. 250] underclays vitrify is  $100^{\circ}$  F. or more.

Shales, fine-grained, earthy materials that have a layered structure, are the most common rock type found on the earth's surface. They are found in association with coals, limestones, and sandstones.

Ratios of  $\text{SiO}_2$  to  $\text{Al}_2\text{O}_3$  and percentages of  $\text{K}_2\text{O}$  and  $\text{Fe}_2\text{O}_3$  are higher in shales than in underclays. Shales generally contain a relatively high ratio of the minerals illite and chlorite to kaolinite. Most shales burn to a red color and fire at temperatures  $100^{\circ}$  to  $200^{\circ}$  F. lower than those of underclays. The range of temperatures over which shales vitrify is  $50^{\circ}$  to  $100^{\circ}$  F. Ceramic products are made from shales of Pennsylvanian and Mississippian age (fig. 2).

Glacial materials are the most variable of commercially used clays in Indiana. These materials can be subdivided on the basis of origin into three types: (1) till, (2) lake deposits, and (3) river deposits. Tills are glacial sediments deposited directly by ice, whereas lake and river deposits were laid down by meltwaters from glaciers. Lake sediments were deposited in lakes associated with a glacier, and river muds were deposited by meltwaters flowing down major drainage channels away from the ice.

Glacial clays contain relatively more  $\text{CaO}$ ,  $\text{MgO}$ , and  $\text{Na}_2\text{O}$  than do underclays and shales, whereas underclays and shales contain more  $\text{Al}_2\text{O}_3$ . Glacial clays contain a relatively low percentage of clay minerals and a high percentage of quartz ( $\text{SiO}_2$ ) and feldspar ( $\text{NaAlSi}_3\text{O}_8$ ) and a significant amount of calcite ( $\text{CaCO}_3$ ) and dolomite ( $\text{CaMg}(\text{CO}_3)_2$ ). Glacial clays fire at approximately  $100^{\circ}$  F. below the temperature for shale, and the vitrification range is short, as for most glacial clays it is less than  $50^{\circ}$  F. The fired color of glacial clays is variable; generally it is some shade of red or tan.

All underclays are Pennsylvanian in age and are restricted geographically to the southwestern part of the state (pl. 1). Ashley (1899, pp. 85-91) divided the "Coal Measures" into nine divisions. Each division except I and IX contained a coal of economic importance. In general, the lower coals (including Coal II) are found in localized basins in only a few areas of Indiana. In contrast, Coals III to VII underlie extensive areas in continuous thick beds. Most underclays have about the same distribution as the coals.



Commercial underclays in Indiana are mined from beneath the Upper Cannelton coal near Cannelton, the Block coals near Brazil, the Minshall coal near Huntingburg, and Coals III and IIIa near Montezuma, Mecca, and Bloomington. Only underclays from the Minshall coal and Coal IIIa are used in making refractory brick. Others are the raw materials for structural clay products and, at two locations, for pottery. Still other underclays may become raw materials for manufacturing structural clay products, for bonding clays in foundries, and for other more specialized purposes.

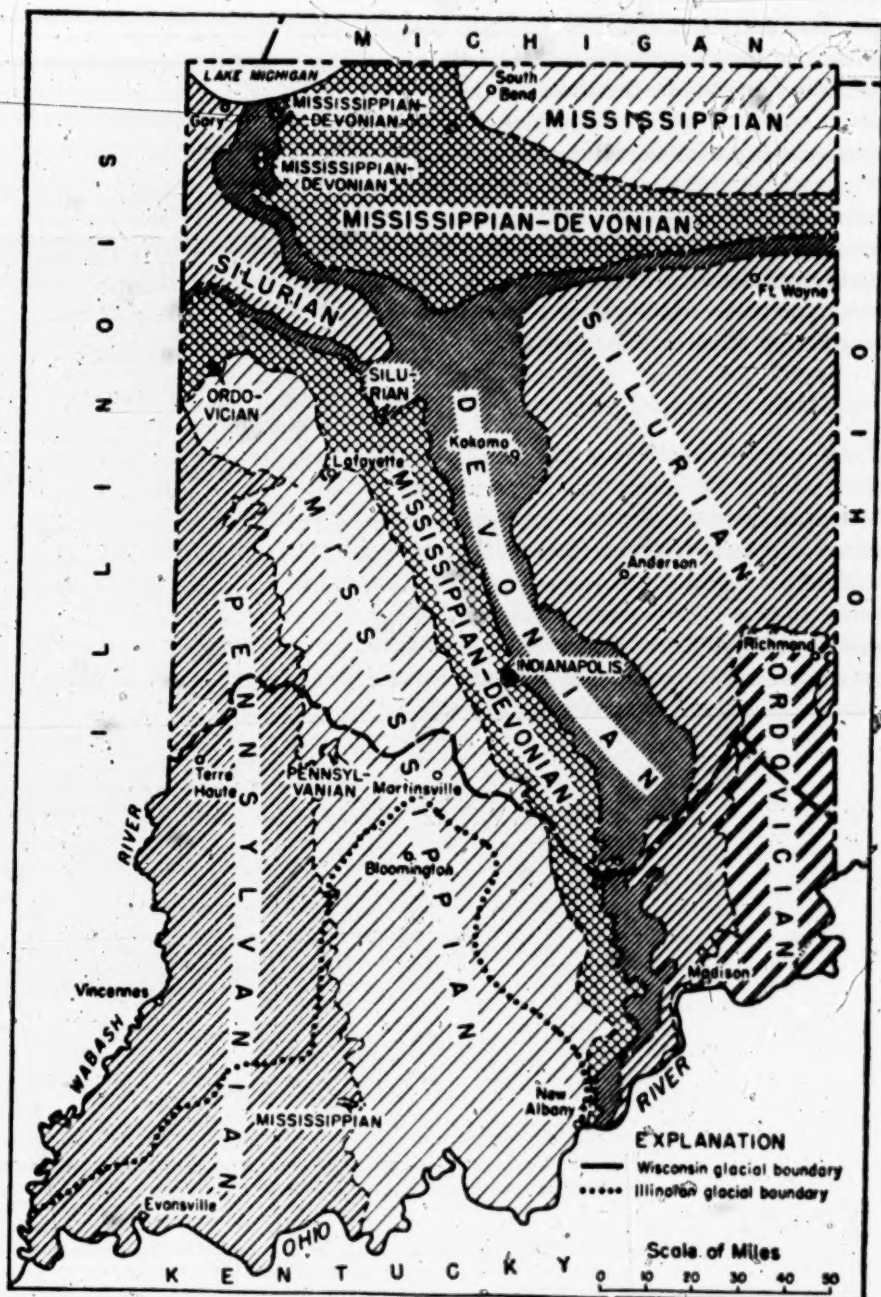


Figure 2. Generalized bedrock map of Indiana. Compiled by J. B. Patton.

[fol. 252] Shales that are now used commercially in Indiana are Pennsylvanian and early Mississippian in age (figs. 1 and 2). Some Devonian and Silurian shales also were utilized. Eight plants use shale from the Borden formations (early Mississippian) (fig. 2). Shales are present in every Pennsylvanian formation, but only those from the Mansfield, Brazil, Linton, Dugger, and Shelburn formations are used currently (fig. 1).

In making structural clay products Wisconsin tills are used largely in northern Indiana and Wisconsin lake clays in northwestern Indiana. Similar clay products are manufactured from Wisconsin river clays in three plants in the Ohio Valley and from Illinoian till at a plant in Batesville (pl. 1).

#### PRODUCTION AND USES

In the latest report of the U. S. Bureau of Mines, 397,336 short tons of underclay valued at \$732,025 and 939,956 short tons of shales and glacial clays valued at \$968,184 were produced in Indiana in 1952. The total value for clay and shale was \$1,700,209. Annual production in tons increased 30 times for underclays and 40 times for shales and glacial clays from 1938 through 1952 (figs. 3 and 4). Most ceramic plants in Indiana reflect this startling expansion in production since World War II.

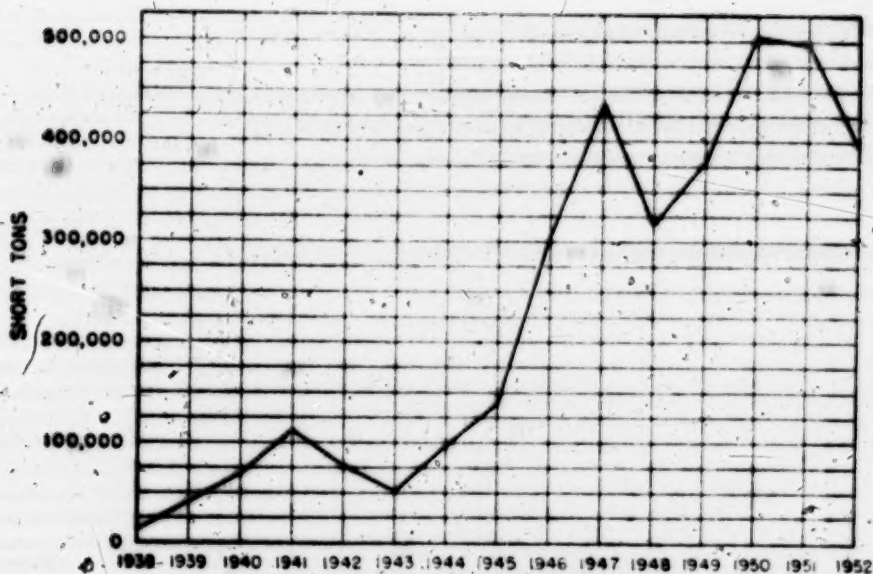


Figure 3. Graph showing annual production of underclay in Indiana, 1938-1952.

[fol. 253]

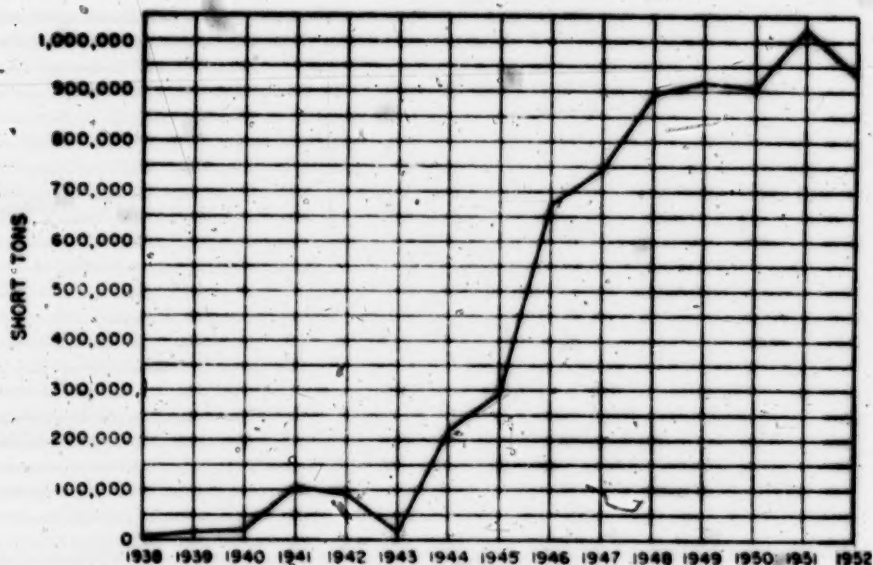


Figure 4. Graph showing annual production of shale and glacial clay in Indiana, 1938-1952.

Indiana's clays and shales are manufactured into many products. Any single clay material is not satisfactory for all purposes, as the requirements for some products are specific and limited. Many clays can be used for structural clay products which do not require rigid specifications (see table below).

#### Raw materials used in making ceramic products in Indiana

Product	Fireclay	Shale	Glacial clay
Refractory brick	X		
Pottery	X		
Cement		X	
Structural tile	X	X	
Farm drain tile	X	X	X
Face brick	X	X	
Back-up brick		X	X
Sewer pipe	X	X	
Flue linings	X		X
Conduit pipe	X		
Paving brick		X	
Insulators	X	X	
Lightweight aggregate		X	



[fol. 254] 1. Adams Clay Products Company  
Martinsville

Pit location: Morgan County

Half a mile southwest of Brooklyn on Highway 67  
NE1/4SW1/4 sec. 34, T. 13 N., R. 1 E.

Owner: corporation

General manager: James A. Cunningham

Products: face brick

Fired colors: buff and red

Fired temperature: 2150° F. (buff) and 1850° F. (red)

Type of kiln: periodic and continuous

Capacity: 90,000 units daily

Employees: 70

Raw material: Borden shale from captive pit and underclay  
purchased from Brazil area

2. Albion Tile Company

Albion

Pit location: Noble County

NW1/4SE1/4 sec. 24, T. 34 N., R. 9 E.

Owner and general manager: Fred Landgraf

Products: drain tile

Fired color: light red

Fired temperature: 1800° F.

Type of kiln: periodic

Capacity: 15,000 units per year

Employees: 5

Raw material: glacial till

3. American Art Clay Company, Inc.

Speedway City, Marion County

Owner: corporation

General manager: T. O. Philpott

Products: modeling clay, crayons, chalks, and other special  
art products

Fired color: buff

Fired temperature: 1900° to 2381° F.

Type of kiln: periodic

Employees: 200

Raw material: Minshall underclay purchased from Hunting-  
burg and imported domestic clays

[fol. 245] 4. American Radiator and Standard Corporation

Kokomo, Howard County

Owner: corporation

General manager: V. S. Schorv

Products: tanks, bowls, lavatories, and urinals

Fired colors: white and seven colors

Fired temperature: 2200° F.

Type of kiln: continuous

Capacity: 1,200 pieces per day

Employees: 289

Raw material: imported domestic and foreign clays

5. American Vitrified Products Company

Brazil, Clay County

Owner: corporation

General manager: Charles Wilson

Products: sewer pipe, flue liners, and glazed drain tile

Fired color: tan

Fired temperature: 2050° to 2100° F.

Type of kiln: periodic

Capacity: 3,000 tons per month

Employees: 100

Raw material: Upper Brazil Block underclay and Borden shale from Crawfordsville

6. Arketex Ceramic Corporation

Brazil, Clay County

Pit location: Vermillion County

2 miles south of Newport

SE1/4SE1/4 sec. 10, T. 16 N., R. 9 W.

Pit manager: J. Britton

Employees: 6

Capacity: 125 tons per day

Raw material: underclay of Coal IIIa

7. Arketex Ceramic Corporation Plant No. 2

Brazil, Clay County

Owner: corporation; John Stelle, Chairman of the Board

John A. Stelle, President

Production manager: Ralph Weston

Ceramist: Ross Evans

Products: ceramic glazed structural tile

Fired color: buff

Fired temperature: 2040° F.

Type of kiln: continuous

Capacity: 260 tons per day

[fol. 256] Employees: 150

Raw material: underclay of Coal IIIa from captive pit and Upper Block underclay purchased from Brazil area

8. Arketex Ceramic Corporation Plant No. 3

Brazil, Clay County

Owner: corporation; John Stelle, Chairman of the Board

John A. Stelle, President

Production manager: Ralph Weston

Ceramist: Ross Evans

Products: ceramic glazed structural tile

Fired color: buff

Fired temperature: 2040° F.

Type of kiln: continuous

Capacity: 350 tons per day

Employees: 300

Raw material: underclay of Coal IIIa from captive pit and Upper Block underclay purchased from Brazil area

9. Arketex Ceramic Corporation Plant No. 4

Brazil, Clay County

Owner: corporation; John Stelle, Chairman of the Board

John A. Stelle, President

Production manager: Ralph Weston

Ceramist: Ross Evans

Products: ceramic glazed structural tile

Fired color: buff

Fired temperature: 2040° F.

Type of kiln: continuous

Capacity: 100 tons per day

Employees: 100

Raw material: underclay of Coal IIIa from captive pit and Upper Block underclay purchased from Brazil area

10. Art Chemical Products, Inc.

Huntington, Huntington County

Owners: G. J. Bippus, W. H. Ball, and W. V. Clipp

General manager: G. J. Bippus

**Products:** modeling clay

**Employees:** 18

**Raw material:** imported domestic clays

**11. Ayer-McCarel-Reagen Clay Company**

Carbon, Clay County

P. O. address: Brazil

**Owner:** corporation

{fol. 257] **General manager:** J. C. Hutchinson

**Products:** building tile and special tile for sewage disposal plants

**Fired color:** buff

**Fired temperature:** 2050° F.

**Type of kiln:** periodic

**Capacity:** 100 tons per day

**Employees:** 38

**Raw material:** Upper Block underclay purchased from Brazil area

**12. Big Bend Collieries**

Box 293, Brazil

**Pit location:** Clay County

Two strip pits near Asherville and Billville

**Owner:** corporation

**General manager:** Milton Goodman

**Products:** clay, coal, and shale

**Employees:** 150

**Capacity:** 5,000 to 6,000 tons per month

**Raw material:** Upper Block underclay and shale

**13. Bloomfield Brick Company**

Bloomfield

**Pit location:** Greene County

On east edge of Bloomfield

SE1/4NE1/4 sec. 23, T. 7N., R. 5 W.

**Owner:** corporation

**General manager:** H. Sparks

**Products:** face brick and common brick

**Fired color:** red

**Fired temperature:** 1850° F.

**Type of kiln:** periodic

**Capacity:** 60,000 units per day

**Employees:** 50

**Raw material:** shale from Mansfield formation

14. Bonnaville Clay Products, Inc.  
Boonville

Pit location: Warrick County

On east edge of Boonville

SE1/4SE1/4 sec. 25, T. 5 S., R. 8 W.

Owner and general manager: John E. Richard

Products: building tile, drain tile, and face brick

Fired color: red

Fired temperature: 2200° F.

Type of kiln: periodic

Capacity: 20,000 units per day

[fol. 258] Employees: 10 to 15

Raw material: shale above Coal V

15. Brazil Clay Company Plant No. 1

Box 331, Brazil, Clay County

Owner: corporation

Leo Girton, President

General manager: George Barnhardt

Products: face brick

Fired colors: buff, gray, tan, and brown

Fired temperature: 1900° F. (average); varies from  
1860° to 1960° F.

Type of kiln: periodic

Capacity: 55,000 to 65,000 units per day

Employees: 80

Raw material: Upper Block underclay purchased from  
Brazil area

16. Brazil Clay Company Plant No. 2

Box 331, Brazil, Clay County

Owner: corporation

Leo Girton, President

General manager: George Barnhardt

Products: face brick

Fired colors: buff, gray, tan, and brown

Fired temperature: 1900° F. (average); varies from  
1860° to 1960° F.

Type of kiln: periodic

Capacity: 40,000 to 50,000 units per day

Employees: 40

Raw material: Upper Block underclay purchased from  
Brazil area



# 17. Brazil Hollow Brick and Tile Company, Inc.

Brazil, Clay County

Owner: corporation

General manager: John Price

Products: telephone conduit tile

Fired color: buff

Fired temperature: 2000° F.

Type of kiln: periodic

Capacity: 100 tons per day

Employees: 100

Raw material: Upper Block underclay purchased from Brazil area

# 18. Bremen Clay Products Company

Bremen

Pit location: Marshall County

[fol. 259] 3 miles southwest of Bremen

SE1/4NE1/4 sec. 9, T. 34 N., R. 3 E.

Owners: T. J. Thomas and K. Thomas

General manager: T. J. Thomas

Products: farm drain tile, building tile, and common brick

Fired color: light tan to red

Fired temperature: 1850° F.

Type of kiln: periodic

Capacity: 2 kilns per week

Employees: 6 to 10

Raw material: Pleistocene lake clay

# 19. Brooklyn Brick Company, Inc.

Brooklyn

Pit location: Morgan County

South edge of Brooklyn

NE1/4NE1/4 sec. 35, T. 13 N., R. 1 E.

Owner: corporation

General manager: Oliver D. Webb

Products: face and common brick, modular and standard size Roman, Norman and SCR brick

Fired color: red

Fired temperature: 1880° F.

Type of kiln: periodic

Capacity: 65,000 units per day

Employees: 60

Raw material: Borden shale

**20. Brown Coal Company**

R. R. 2, Centerpoint

Pit location: Clay County

2½ miles south of junction of Indiana Highways 46  
and 59 NW1/4SW1/4 sec. 32, T. 11 N., R. 6W.

Owner and general manager: William Brown and Son

Products: coal and clay

Employees: 5

Capacity: 700 to 1,500 tons per month

Raw material: Upper Block underclay

**21. Cannelton Sewer Pipe Company**

Cannelton

Mine location: Perry County

1 mile northeast of Cannelton

SW1/4SE1/4 sec. 3, T. 7S., R. 3W.

Owner: corporation

E. F. Clemens, President

[fol. 260] General manager: E. C. Clemens

Products: sewer pipe, flue linings, wall coping

Fired color: tan

Fired temperature: 2100° F.

Type of kiln: periodic

Capacity: 150 tons per day

Employees: 130

Raw material: Cannelton underclay and shale (Mansfield  
formation.)**22. Cayuga Brick and Tile Corporation**

Bloomingdale, Parke County

Pit location: Parke County

NE1/4NE1/4 sec. 9, T. 16 N., R. 8 W.

Manager: Herbert Miller

Employees: 4

Capacity: 50,000 tons per year

Raw material: underclay of Coals III and IIIa

**23. Cayuga Brick Corporation**

Cayuga

Pit location: Vermillion County

South of Cayuga

NW1/4NE1/4 sec. 7, T. 17 N., R. 9 W.

Owner: corporation

General manager: Ray Koester

**Products:** brick and tile

**Fired colors:** red and buff

**Fired temperature:** 2000° F.

**Type of kiln:** periodic

**Capacity:** 85 to 100 tons per day

**Employees:** 30

**Raw material:** underclay of Coals III and IIIa purchased near Bloomingdale and shale from Staunton formation from captive pit

**24. Clay City Pipe Company**

**Box 161, Rockville**

**Pit and plant location:** Mecca, Parke County

**On south edge of Mecca**

**NE1/4SE1/4 sec. 20, T. 15 N., R. 8 W.**

**Owner:** corporation

**General manager:** H. D. Cumings

**Superintendent:** Paul Insley

**Products:** sewer pipe

**Fired color:** tan

**Fired temperature:** 2100° F.

**[fol. 261] - Type of kiln:** periodic

**Capacity:** 90 tons per day

**Employees:** 85

**Raw material:** underclay of Coals III and IIIa purchased near Bloomingdale and shale above Coal IIIa from captive pit

**25. Clay City Pipe Company**

**Box 127, Montezuma**

**Pit and plant location:** Vermillion County

**Half a mile west of Montezuma**

**SE1/4SE1/4 sec. 27, T. 16 N., R. 9 W.**

**Owner:** corporation

**General manager:** H. D. Cumings

**Superintendent:** Paul Insley

**Products:** fire brick, face brick, flue lining

**Fired color:** buff

**Fired temperature:** 2000° F.

**Type of kiln:** periodic

**Capacity:** 90 tons per day

**Employees:** 25

**Raw material:** underclay of Coal IIIa

## 26. Clay City Pottery

Clay City, Clay County

Owner and general manager: Lloyd Griffith

Products: flower pots, stoneware, jugs, crocks, bird baths, garden ware, etc.

Fired color: buff

Fired temperature: 2150° to 2180° F.

Type of kiln: periodic

Capacity: 40,000 units per year

Employees: 5

Raw material: Upper Block underclay purchased from Brazil area

## 27. Crown Potteries Company, Inc.

Evansville, Vanderburgh County

Owner: corporation

General manager: L. A. Lundquist

Products: dinnerware and miscellaneous pieces

Fired color: white

Fired temperature: 2000° F.

Type of kiln: continuous

Capacity: 102,000 units per week

Employees: 190

Raw material: domestic and foreign clays

[fol. 262] 28. Dee Clay Products Company, Inc.

Bloomington, Parke County

Owner: corporation

General manager: Herbert Miller

Products: drain tile, sewer pipe, flue linings

Fired colors: red and buff

Fired temperature: 1900° F.

Type of kiln: periodic

Capacity: 50 tons per day

Employees: 50

Raw material: underclay of Coals III and IIIa purchased near Bloomington

## 29. Durham and Heidbrieder Clay Company

Cayuga

Pit location: West Union, Parke County

NW1/4NW1/4 sec. 8, T. 16 N., R. 8 W.

Owners and general managers: Russell Durham and Fred Heidbrieder

Employees: 7

Capacity: 150 tons per day

Raw material: underclay of Coals III and IIIa

30. Engle Studio, Inc.

Newburgh, Warrick County

Owners: Mr. and Mrs. Walter Messich

General manager: Walter Messich

Products: decorative art ware

Fired colors: all colors

Fired temperature: 2000° F.

Type of kiln: periodic

Capacity: 100 units per day

Employees: 9

Raw material: imported domestic clays

31. Francesville Drain Tile Company

Francesville

Pit location: Pulaski County

Half a mile north of Francesville

SE1/4NE1/4 sec. 33, T. 30 N., R. 4 W.

Owner: E. C. Overmyer and Sons

General manager: E. C. Overmyer

Products: drain tile

Fired color: tan

Fired temperature: 1700° F.

Type of kiln: periodic

Capacity: 4,000 tons per year

[fol. 263] Employees: 7

Raw material: Pleistocene till

32. G. and F. Coal Company

Brazil

Pit location: three pits in Clay and Parke Counties

Owner and general manager: Leo Gilton

Products: coal, underclay, and shale

Employees: 30

Capacity: 500 tons per day

Raw material: Upper Block underclay and shale

33. Gill Clay Pottery Company

Muncie, Delaware County

Owner: corporation

General manager: John H. Gill



**Products:** refractory glass pots, lids, and furnace linings (

**Fired color:** buff (glass pots unfired)

**Fired temperature:** 2400° F.

**Type of kiln:** periodic

**Capacity:** 50 pots per month

**Employees:** 30 to 50

**Raw material:** imported domestic and foreign clays

#### 34. Hannell Pottery Company

**R. R. 2, Chesterton, Porter County**

**Owners and general managers:** Mr. and Mrs. Venol Hannell

**Products:** pottery

**Fired colors:** buff, white, and red

**Fired temperature:** 1800° to 2000° F.

**Type of kiln:** periodic

**Capacity:** 25 to 50 units per week

**Employees:** 2

**Raw material:** imported domestic clays

#### 35. Harbison-Walker Refractory Company

**East Chicago, Lake County**

**Owner:** corporation

**General manager:** F. M. Hiles

**Products:** refractory brick

**Type of kiln:** continuous

**Capacity:** 300 tons per day

**Employees:** 200

**Raw material:** imported ganister

#### [fol. 264] 36. Huntingburg Brick Company

**Huntingburg**

**Pit and mine location:** Dubois County

**Half a mile southwest of Huntingburg**

**NE1/4SE1/4 sec. 33, T. 2 S., R. 5 W.**

**Owner and general manager:** Mrs. G. C. Landgrebe

**Products:** fire brick, face brick, and common brick

**Fired colors:** buff and red

**Fired temperature:** 1960° F. for buff-colored and 1900°

**F. for red-colored**

**Type of kiln:** periodic

**Capacity:** 21,000 units per day

**Employees:** 30

**Raw material:** underclay of Minshall coal and shale above Minshall coal

**37. Hydraulic Press Brick Company**  
Crawfordsville

**Pit location:** Montgomery County

Half a mile north of Crawfordsville

NW1/4NW1/4 sec. 29, T. 19 N., R. 4 W.

**Owner:** corporation

**General manager:** R. Z. Strouse

**Products:** brick

**Fired colors:** buff and red

**Fired temperature:** 1850° F.

**Type of kiln:** periodic

**Capacity:** 60,000 units per day

**Employees:** 60

**Raw material:** Borden shale from captive pit and underclay of Coals III and IIIa purchased in Bloomingdale area

**38. Indiana Drain Tile Company**  
Brooklyn

**Pit location:** Morgan County

Half a mile south of Brooklyn

NW1/4NW1/4 sec. 36, T. 13 N., R. 1 E.

**Owners:** J. M. Powell Heirs

**General manager:** O. E. Powell

**Products:** building tile, drain tile, back-up tile, and facing tile

**Fired color:** red

**Fired temperature:** 1800° F.

**Type of kiln:** periodic

**Capacity:** 80 tons per day

**Employees:** 43

**Raw material:** Borden shale

[fol. 265] **39. Indiana State Farm**  
Putnamville

**Pit location:** Putnam County

1 mile south of State Police Station on U. S. Highway

40

NW1/4SE1/4 sec. 19, T. 13 N., R. 4 W.

**Owner:** state of Indiana

**General manager:** R. Cramer

**Products: brick**

Fired color: red

Fired temperature: 1860° F.

Type of kiln: periodic

Capacity: 35,000 units per day

Employees: 60 to 100

Raw material: shale from Mansfield formation

**40. Inman Tile Company**

R. R. 4, Hartford City

Pit location: Blackford County

1 $\frac{3}{4}$  miles west of Mill Grove

NW1/4SE1/4 sec. 31, T. 23 N., R. 11 E.

Owner and general manager: Neil Inman

Products: farm drain tile and back-up tile

Fired color: light red

Fired temperature: 1750° F.

Type of kiln: periodic

Capacity: 2 kilns per month

Employees: 7

Raw material: glacial till

**41. Jackson Brick and Hollow Ware Company**

Brownstown

Pit location: Jackson County

Northeast edge of Brownstown

SW1/4NE1/4 sec. 11, T. 5 N., R. 4 E.

Owner: corporation

General manager: James Heller

Products: drain tile, brick, back-up tile, building tile

Fired color: red

Fired temperature: 1800° F.

Type of kiln: periodic

Capacity: 75 tons per day

Employees: 30

Raw material: Borden shale

**42. Jones Tile Company**

Berne

[fol. 266] Pit location: Adams County

East side of Berne

NE1/4SE1/4 sec. 33, T. 26 N., R. 14 E.

Owner and general manager: Rawley D. Jones

Products: farm drain tile  
 Fired color: light red  
 Fired temperature: 1750° F.  
 Type of kiln: periodic  
 Capacity: 25 kilns per year

Employees: 5

Raw material: glacial till

#### 43. Kalamazoo Clay Company

Carbon, Clay County

Owner: corporation

General manager: George MacFarland

Products: building tile, silo tile, acid tank tile

Fired colors: brown, buff, and gray

Fired temperature: 2050° to 2100° F.

Type of kiln: periodic

Capacity: 50 tons per day

Employees: 45

Raw material: Upper Block underclay purchased from Brazil area

#### 44. Klopfenstein Tile Company

Grabill

Pit location: Allen County

South edge of Grabill

SE1/4NE1/4 sec. 25, T. 32 N., R. 13 E.

Owner and general manager: Aaron Klopfenstein

Products: farm drain tile

Fired color: light red

Fired temperature: 1750° F.

Type of kiln: periodic

Capacity: 8 kilns per year

Employees: 5

Raw material: glacial till

#### 45. Kokomo Sanitary Pottery Company

Kokomo, Howard County

Owner: corporation.

General manager: Frank Burley

Products: bowls, lavatories, and tanks

Fired color: white

Fired temperature: 2450° F.

Type of kiln: continuous

[fol. 267] Capacity: 1,000 units per day

Employees: 195

Raw material: imported domestic and foreign clays

46. Kretz Brick Company

Washington

Pit location: Daviess County

Half a mile south of Montgomery

NE1/4NW1/4 sec. 35, T. 3 N., R. 6 W.

Owners: E. A. and J. H. Kretz

General manager: E. A. Kretz

Products: drain tile, building tile, brick

Fired colors: buff and red

Fired temperature: 1800° P. (red) and 1900° F. (buff)

Type of kiln: periodic

Capacity: 6,000 units per day

Employees: 13

Raw material: underclay of Coal IXa, shale above Coal IVa, and Illinoian glacial till

47. Krick-Tyndall Company

Decatur

Pit location: Adams County

1 mile southwest of Decatur

NE1/4NE1/4 sec. 9, T. 27 N., R. 14 E.

Owner: corporation

General manager: V. M. Krick

Products: farm drain tile

Fired color: red

Fired temperature: 1900° F.

Type of kiln: periodic

Capacity: 750 tons per week

Employees: 90

Raw material: glacial till

48. Lehigh Cement Company

Mitchell, Lawrence County

Pit location: Jackson County

2 1/2 miles east of Brownstown.

SW1/4NW1/4 sec. 6, T. 5 N., R. 5 E.

Owner: corporation

General manager: John Pillman

Capacity: 400 tons of shale per day



**Raw material:** Borden shale

[fol. 268] 49. Log Cabin Coal Company

316 East Vermont, Brazil

**Pit locations:** Clay County (one north of Brazil and one east of Asherville)

**Owner:** corporation

**General manager:** James Eden

**Products:** underclay of Upper and Lower Block coal

**Capacity:** 10,000 tons per month

**Employees:** 12

50. Lone Star Cement Corporation

Box 482, Greencastle, Putnam County

**Owner:** corporation

**General manager:** J. J. Van Alstyne

**Capacity:** 100 tons per day

**Raw material:** shale above Upper Block coal purchased in Brazil area

51. Loogootee Clay Products Corporation

Loogootee

**Pit location:** Martin County

East edge of Loogootee

NW1/4NW1/4 sec. 19, T. 3 N., R. 4 W.

**Owner:** corporation

**General manager:** Walter X. Brown

**Products:** drain tile, building tile, and brick

Fired color: red

Fired temperature: 1900° F.

Type of kiln: periodic

Capacity: 75,000 units per week

**Employees:** 35

**Raw material:** shale from Brazil formation

52. Louisville Cement Company

Speed

**Pit location:** Clark County

3½ miles northwest of Speed

NE1/4 donation 148 (Clark Military Grant)

**Owner:** corporation

**General manager:** Arthur Beckel

**Capacity:** 250 tons per day

**Raw material:** Borden shale

## 53. Louisville Pottery Company

Louisville, Ky.

Mine location: Dubois County

Southwest edge of Huntingburg

[fol. 269] NW1/4SE1/4 sec. 4, T. 3 S., R. 5 W.

Owner: corporation

John B. Taylor, President

General manager: Charles Rafferty

Products: stoneware

Fired color: buff

Fired temperature: 2250° F.

Type of kiln: periodic and continuous

Capacity: 100 tons per month

Employees: 65

Raw material: underclay of Minshall coal

## 54. Majenica Tile Company

R. R. 5, Huntington

Pit location: Huntington County

Southeast edge of Majenica

SW1/4NE1/4 sec. 38, T. 27 N., R. 10 E.

Owner and general manager: Joe Mills

Products: farm drain tile

Fired color: light red

Fired temperature: 1700° F.

Type of kiln: periodic

Capacity: 40 kilns per year

Employees: 7

Raw material: glacial till

## 55. Martin Tile Company

Dunkirk

Pit location: Jay County

SW1/4NW1/4 sec. 8, T. 22 N., R. 12 E.

Owners and general managers: Martin Brothers

Products: farm drain tile, building tile, and brick

Fired color: red

Fired temperature: 1800° F.

Type of kiln: periodic

Capacity: 200 tons per month

Employees: 6

Raw material: glacial till

56. Martinsville Brick Company

Martinsville, Morgan County

Owner: Poston Brick and Concrete Products, Springfield  
Illinois

General manager: T. D. Fleming

Products: brick

Fired color: buff

Fired temperature: 1900° F.

[fol. 270] Type of kiln: periodic

Capacity: 50,000 units per day

Employees: 40

Raw material: Upper Block underclay purchased from Brazil area

57. Maumee Collieries Company

Terre Haute, Vigo County

Pit location: Owen County

Southwest edge of Coal City

SE1/4SE1/4 sec. 11, T. 9 N., R. 6 W.

Owner: corporation

Hugh B. Lee, President

General manager: Hugh B. Lee

Products: Upper Block coal and underclay

Capacity: 1,500 tons of clay per day

58. McCool Loam Company

Chesterton

Pit location: Porter County

1 mile west of junction of Indiana Highway 149 and

U. S. Highway 20

NW1/4NW1/4 sec. 5, T. 36 N., R. 6 W.

Owner and general manager: C. O. Johnson

Products: pottery and furnace lining clays

Employees: 2

Capacity: two railroad cars per week

Raw material: glacial lake clay

59. Medaryville Tile Company

Medaryville

Pit location: Pulaski County

Southeast edge of Medaryville

NE1/4SW1/4 sec. 4, T. 30 N., R. 4 W.

Owner and general manager: Glen A. Howe

Products: farm drain tile

Fired color: red

Fired temperature: 1700° F.

Type of kiln: periodic

Capacity: 10,000 units/per week

Employees: 71

Raw material: glacial till

60. Medora Brick and Tile Company

Medora

Pit location: Jackson County

1 mile north of Medora

[fol. 271] NE1/4NE1/4 sec. 27, T. 5 N., R. 3 E.

Owner: corporation

General manager: James Heller

Products: face brick and back-up brick

Fired color: red

Fired temperature: 1800° F.

Type of kiln: periodic

Capacity: 54,000 units per-day

Employees: 50

Raw material: Borden shale

61. Midwest Aggregates, Inc.

Brooklyn

Pit location: Morgan County

Half a mile southwest of Brooklyn

SE1/4NE1/4 sec. 35, T. 13 N., R. 1 E.

Owner: corporation

General manager: W. G. Brierley, Jr.

Products: expanded shale

Type of kiln: rotary

Capacity: 350 cu. yds.

Employees: 20

Raw material: New Providence shale

62. Nateo Corporation

Brazil, Clay County

Owner: corporation

General manager: Roy Hunter

Products: sewer tile and flue tile

Fired color: brown

Fired temperature: 2100° F.

Type of kiln: periodic  
Capacity: 100 tons per day

Employees: 100

Raw material: Upper Block underclay purchased in Brazil area

63. Natco Corporation  
Hobart

Pit location: Lake County  
NW1/4SW1/4 sec. 20, T. 36 N., R. 7 W.

Owner: corporation

General manager: L. E. Matheny

Products: building tile, drain tile, brick

Fired color: light red

Fired temperature: 1850° F.

Type of kiln: periodic

[fol. 272] Capacity: 200 tons per day

Employees: 65

Raw material: glacial lake clay

64. National Brick Company

3150 West Touhy Avenue, Chicago, Ill.

Pit and plant location: Maynard, Lake County

NE1/4SW1/4 sec. 31, T. 36 N., R. 9 W.

Owner: corporation

General manager: Jack Oehmke

Products: common brick

Fired color: salmon

Fired temperature: 1800° F.

Type of kiln: periodic

Capacity: 300,000 units per day

Employees: 10

Raw material: glacial lake clay

65. National Tile and Manufacturing Company  
Anderson, Madison County

Owner: corporation

General manager: Richard B. Alexander

Products: floor and wall tile

Fired colors: white and red

Fired temperature: 2100° F.

Type of kiln: continuous

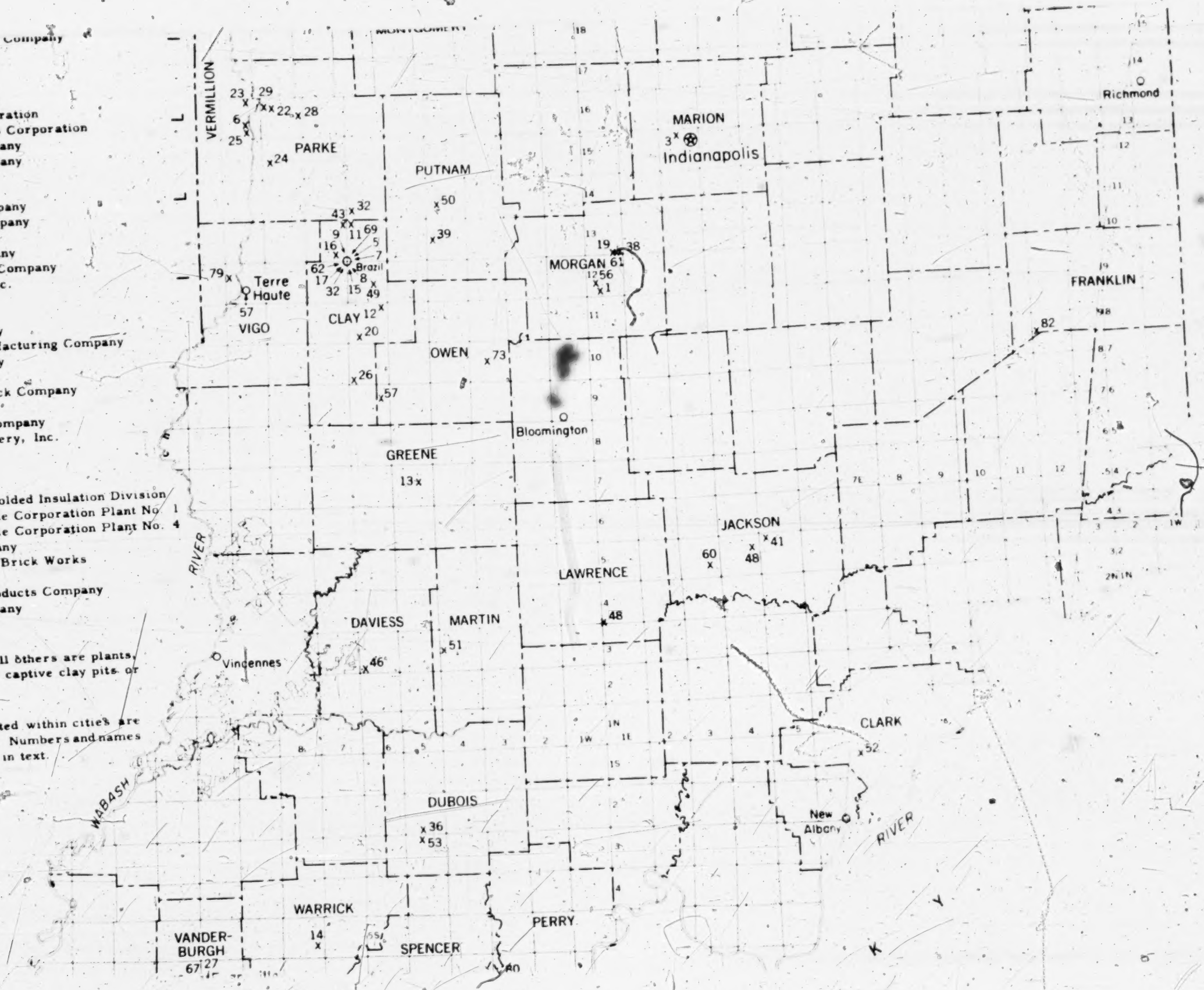
Capacity: 20,000 to 25,000 sq. ft. per day



- 45 Kokomo Sanitary Pottery Company
- 46 Kretz Brick Company
- 47 Krick-Tyndall Company
- 48 Lehigh Cement Company
- 49 Log Cabin Coal Company
- 50 Lone Star Cement Corporation
- 51 Loogottee Clay Products Corporation
- 52 Louisville Cement Company
- 53 Louisville Pottery Company
- 54 Majenica Tile Company
- 55 Martin Tile Company
- 56 Martinsville Brick Company
- 57 Maumee Collieries Company
- 58 McCool L. & M. Company
- 59 Medaryville Tile Company
- 60 Medora Brick and Tile Company
- 61 Midwest Aggregates, Inc.
- 62 Natco Corporation
- 63 Natco Corporation
- 64 National Brick Company
- 65 National Tile and Manufacturing Company
- 66 Oriental Brick Company
- 67 Peerless Pottery, Inc.
- 68 Poston and Herron Brick Company
- 69 Quality Coal Company
- 70 Rockport Drain Tile Company
- 71 Rockport Sanitary Pottery, Inc.
- 72 Rustone Corporation
- 73 Rustone Corporation
- 74 Simpson Clay Works
- 75 Square D Company, Molded Insulation Division
- 76 Standard Brick and Tile Corporation Plant No. 1
- 77 Standard Brick and Tile Corporation Plant No. 4
- 78 Stringtown Tile Company
- 79 Terre Haute Vitrified Brick Works
- 80 U. S. Brick Company
- 81 Veedersburg Clay Products Company
- 82 Herman Wessel Company

\*Clay pit or mine. All others are plants, many of which have captive clay pits or mines.

Pits and plants located within cities are indicated by arrows. Numbers and names correspond to those in text.



Employees: 350

Raw material: imported domestic clays

66. Oriental Brick Company  
Crawfordsville

Pit location: Montgomery County  
North edge of Crawfordsville

NE1/4NE1/4NW1/4 sec. 28, T. 19 N., R. 4 W.

Owner: corporation (American Vitrified)

General manager: George Pocok

Products: brick

Fired colors: red and buff

Fired temperature: 1840° F.

Type of kiln: periodic

Capacity: 45,000 units per day

Employees: 45

Raw material: Borden shale from captive pit and under-  
clay of Coals III and IIIa purchased near Bloomingdale

[fol. 273] 67. Peerless Pottery, Inc.  
Evansville, Vanderburgh County

Owner: corporation

General manager: Charles S. Weaver

Products: sanitary ware

Fired color: white

Fired temperature: 2200° F.

Type of kiln: continuous

Capacity: 512 units per day

Employees: 130

Raw material: imported domestic and foreign clays

68. Poston and Herron Brick Company  
Attica

Pit location: Fountain County  
Half a mile east of Attica

SW1/4SW1/4 sec. 32, T. 22 N., R. 7 W.

Owners: Floyd Poston, W. I. Poston, and F. P. Herron

General manager: Floyd Poston

Products: brick

Fired color: red

Fired temperature: 1800° to 1850° F.

Type of kiln: periodic

Capacity: 30,000 units per day

Employees: 40  
Raw material: Borden shale

69. Quality Coal Company  
Brazil

Pit locations: Clay County near Cardonia and Perth  
Owner: corporation  
General manager: Carl F. Kumpf (President)  
Products: Upper Brazil Block coal and underclay  
Capacity: 65,000 tons of clay per year  
Employees: 60

70. Rockport Drain Tile Company  
Rockport

Pit location: Spencer County  
Half a mile north of Rockport  
NW1/4NW1/4 sec. 23, T. 7 S., R. 6 W.

Owner: corporation  
General manager: Robert W. Richard  
Products: drain and building tile and brick  
Fired color: red  
Fired temperature: 1800° to 1900° F.  
[fol. 274] Type of kiln: periodic  
Capacity: 25 tons per day  
Employees: 16  
Raw material: glacial river clay

71. Rockport Sanitary Pottery, Inc.  
Rockport, Spencer County

Owner: corporation  
General manager: G. M. Pounds  
Products: tanks, bowls, and lavatories  
Fired color: white  
Fired temperature: 2250° F.  
Type of kiln: continuous  
Capacity: 2,500 units per week  
Employees: 72  
Raw material: imported domestic clays

72. Rostone Corporation  
Lafayette

Pit location: Fountain County  
2 1/2 miles northeast of Riverside  
SE1/4SE1/4 sec. 19, T. 22 N., R. 6 W.

**Owner:** corporation

**General manager:** P. W. Jones

**Products:** inorganic molded plastics and molded building stone

**Capacity:** 850 tons per year

**Employees:** 180

**Raw material:** Borden shale

**73. Rostone Corporation**

**Lafayette**

**Plant location:** Spencer, Owen County

**Owner:** corporation

**General manager:** Willis Sampson

**Products:** inorganic molded plastics

**Employees:** 50

**Capacity:** 1 ton per day

**Raw material:** Borden shale from Fountain County

**74. Simpson Clay Works**

**R. R. 3, Huntington**

**Pit location:** Huntington County

**East edge of Simpson**

**SE1/4NW1/4 sec. 28, T. 28 N., R. 10 E.**

**Owner:** Majenica Tile Company

**General manager:** Louie Mills

**[fol. 275] Products:** farm drain tile

**Fired color:** light red

**Fired temperature:** 1700° F.

**Type of kiln:** periodic

**Capacity:** 1,400 tons per year

**Employees:** 6

**Raw material:** glacial till

**75. Square D Company, Molded Insulation Division**

**Peru, Miami County**

**Owner:** corporation

**General manager:** C. H. Brittenham

**Products:** porcelain insulators, heat-shock specialties, and electrical porcelain

**Fired colors:** white and gray

**Fired temperature:** 2250° F.

**Type of kiln:** continuous

**Capacity:** 50,000 pieces per day

Employees: 400

Raw material: imported domestic clays.

76. Standard Brick and Tile Corporation Plant No. 1  
Evansville

Pit location: Vanderburgh County

Northwest edge of Evansville

SW1/4NE1/4 sec. 22, T. 6 S., R. 11 W.

Owner: corporation

General manager: Ralph Kleymeyer

Products: brick

Fired color: red

Fired temperature: 1950° F.

Type of kiln: continuous and periodic

Capacity: 60,000 units per day

Employees: 65

Raw material: shale from Shelburn formation

77. Standard Brick and Tile Corporation Plant No. 4  
Evansville

Pit location: Vanderburgh County

Southeast edge of Evansville

SE1/4NE1/4 sec. 4, T. 7 S., R. 10 W.

Owner: corporation

General manager: Harvey Lambert

Products: face brick and drain tile

Fired color: red

Fired temperature: 1900° F.

[fol. 276] Type of kiln: periodic

Capacity: 32,000 units per day

Employees: 33

Raw material: glacial river clay

78. Stringtown Tile Company

R. R. 2, Monroeville

Pit location: Allen County

3 miles west of Monroeville

SE1/4SE1/4 sec. 10, T. 29 N., R. 14 E.

Owner and general manager: W. A. Bolyard

Products: farm drain tile

Fired color: Light red

Fired temperature: 1800° F.

Type of kiln: periodic

Capacity: 7,000 tiles per day



Employees: 6

Raw material: glacial till

79. Terre Haute Vitrified Brick Works

West Terre Haute

Pit location: Vigo County

North of West Terre Haute on U. S. Highway 150

NE1/4NE1/4 sec. 18, T. 12 N., R. 9 W.

Owner: corporation

General Manager: C. Price, Jr.

Products: brick

Fired colors: red and buff

Fired temperature: 1900° F.

Type of kiln: periodic

Capacity: 50,000 unifs per day

Employees: 50

Raw material: Upper Block underclay purchased from Brazil area and shale above Coal VII from captive pit

80., U. S. Brick Company

Tell City

Pit location: Perry County

Half a mile north of Tell City

SE1/4SE1/4 sec. 19, T. 6 S., R. 3W

Owner: corporation

General manager: W. Eckley

Products: face brick, common brick, and tile

Fired color: red

Fired temperature: 2000° F.

Type of kiln: periodic

[fol. 277] Capacity: 67 tons per day

Employees: 25

Raw material: glacial river clay

81. Hydraulic Press Brick Co.

Veedersburg

Pit location: Fountain County

1 mile north of Veedersburg

NW1/4NW1/4 sec. 31, T. 20 N., R. 7W.

Owner: corporation

General Manager: R. E. Glover

Products: face and common brick, paving brick, and back up tile

Fired color: red



Fired temperature: 1750° to 1850° F.

Type of kiln: periodic

Capacity: 35,000 units per day

Employees: 45 to 47

Raw material: shale from Brazil formation

82. Herman Wessel Company

R. R. 3, Batesville

Pit location: Franklin County

West edge of Batesville

SW1/4SE1/4 sec. 18, T. 10 N., R. 12 E.

Owners and general managers: Wessel Brothers

Products: farm drain tile, brick, and building tile

Fired color: red

Fired temperature: 2000° F.

Type of kiln: periodic

Capacity: 700 tons per year

Employees: 3

Raw material: glacial till

[fol. 278] PRODUCERS AND CONSUMERS OF CLAY AND SHALE  
LISTED BY COUNTIES

Adams County

- 42. Jones Tile Company
- 47. Krick-Tyndall Company

Allen County

- 44. Klopfenstein Tile Company
- 78. Stringtown Tile Company

Blackford County

- 40. Inman Tile Company

Clark County

- 52. Louisville Cement Company

Clay County

- 5. American Vitrified Products Company
- 6. Arketex Ceramic Corporation
- 7. Arketex Ceramic Corporation Plant No. 2
- 8. Arketex Ceramic Corporation Plant No. 3
- 9. Arketex Ceramic Corporation Plant No. 4
- 11. Ayer-McCarel-Reagen Clay Company
- 12. Big Bend Collieries
- 15. Brazil Clay Company Plant No. 1
- 16. Brazil Clay Company Plant No. 2
- 17. Brazil Hollow Brick and Tile Company, Inc.
- 20. Brown Coal Company
- 26. Clay City Pottery
- 32. G. and F. Coal Company
- 43. Kalamazoo Clay Company
- 49. Log Cabin Coal Company
- 62. Nateo Corporation
- 69. Quality Coal Company

Daviess County

- 46. Kretz Brick Company

[fol. 279]

**Delaware County**

33. Gill Clay Pottery Company

**Dubois County**

36. Huntingburg Brick Company

53. Louisville Pottery Company

**Fountain County**

68. Poston and Herron Brick Company

72. Rostone Corporation (pit)

84. Veedersburg Clay Products Company

**Franklin County**

82. Herman Wessel Company

**Greene County**

13. Bloomfield Brick Company

**Howard County**

4. American Radiator and Standard Corporation

45. Kokomo Sanitary Pottery Company

**Huntington County**

10. Art Chemical Products, Inc.

54. Majenica Tile Company

74. Simpson Clay Works

**Jackson County**

41. Jackson Brick and Hollow Ware Company

48. Lehigh Cement Company (pit)

60. Medora Brick and Tile Company

**Jay County**

55. Martin Tile Company

**Lake County**

35. Harbison-Walker Refractory Company

[fol. 280] 63. Natco Corporation

64. National Brick Company

## Lawrence County

48. Lehigh Cement Company

## Madison County

65. National Tile and Manufacturing Company

## Marion County

3. American Art Clay Company, Inc.

## Marshall County

18. Bremen Clay Products Company

## Martin County

51. Logansport Clay Products Corporation

## Miami County

75. Square D Company, Molded Insulation Division

## Montgomery County

37. Hydraulic Press Brick Company

66. Oriental Brick Company

## Morgan County

1. Adams Clay Products Company

19. Brooklyn Brick Company, Inc.

38. Indiana Drain Tile Company

56. Martinsville Brick Company

61. Midwest Aggregates, Inc.

## Noble County

2. Albion Tile Company

[fol. 281]

## Owen County

57. Maumee Collieries Company (pit)

73. Rostone Corporation

## Parke County

- 22. Cayuga Brick and Tile Corporation
- 24. Clay City Pipe Company
- 28. Dee Clay Products Company, Inc.
- 29. Durham and Heidbrieder Clay Company
- 32. G. and F. Coal Company

## Perry County

- 21. Cannelton Sewer Pipe Company
- 40. U. S. Brick Company

## Porter County

- 34. Hannell Pottery Company
- 58. McCool Loam Company

## Pulaski County

- 31. Francesville Drain Tile Company
- 59. Medaryville Tile Company

## Putnam County

- 39. Indiana State Farm
- 50. Lone Star Cement Corporation

## Spencer County

- 70. Rockport Drain Tile Company
- 71. Rockport Sanitary Pottery, Inc.

## Tippecanoe County

- 72. Rostone Corporation
- 73. Rostone Corporation

## Vanderburgh County

- 27. Crown Potteries Company, Inc.
- 67. Peerless Pottery, Inc.
- [fol. 282] 76. Standard Brick and Tile Corporation Plant No. 1
- 77. Standard Brick and Tile Corporation Plant No. 4

## Vermillion County

- 6. Arketex Ceramic Corporation (pit)
- 23. Cayuga Brick Corporation
- 25. Clay City Pipe Company

## Vigo County

- 57. Maumee Collieries Company
- 79. Terre Haute Vitrified Brick Works

## Warrick County

- 14. Boonville Clay Products, Inc.
- 30. Engle Studio, Inc.

[fol. 283]

## References Cited

- Ashley, G. H. (1899) *The coal deposits of Indiana*, Indiana Dept. Geology and Nat. Res., 23d Ann. Rept., pp. 1-1573, 91 pls., 986 figs., 7 maps.
- Blatchley, W. S. (1905) *The clays and clay industries of Indiana*, Indiana Dept. Geology and Nat. Res., 29th Rept., pp. 13-658, 34 pls., 15 figs., 2 maps.
- Callaghan, Eugene, and Ecker Jean (1948) *Directory of producers of mineral raw materials, exclusive of oil and gas, in Indiana*, Indiana Dept. Cons. Div. Geology Director 1, 88 pp., 1 fig.
- Whitlatch, G. I. (1933) *The clay resources of Indiana*, Indiana Dept. Cons. Div. Geology Pub. 123, 298 pp., 40 figs.
- Wier, C. E. (1951) *Director of coal producers in Indiana*, Indiana Dept. Cons. Geol. Survey Directory 2, 45 pp., 1 pl., 2 figs.

(Here follows 1 Photolithograph, side folio 284)



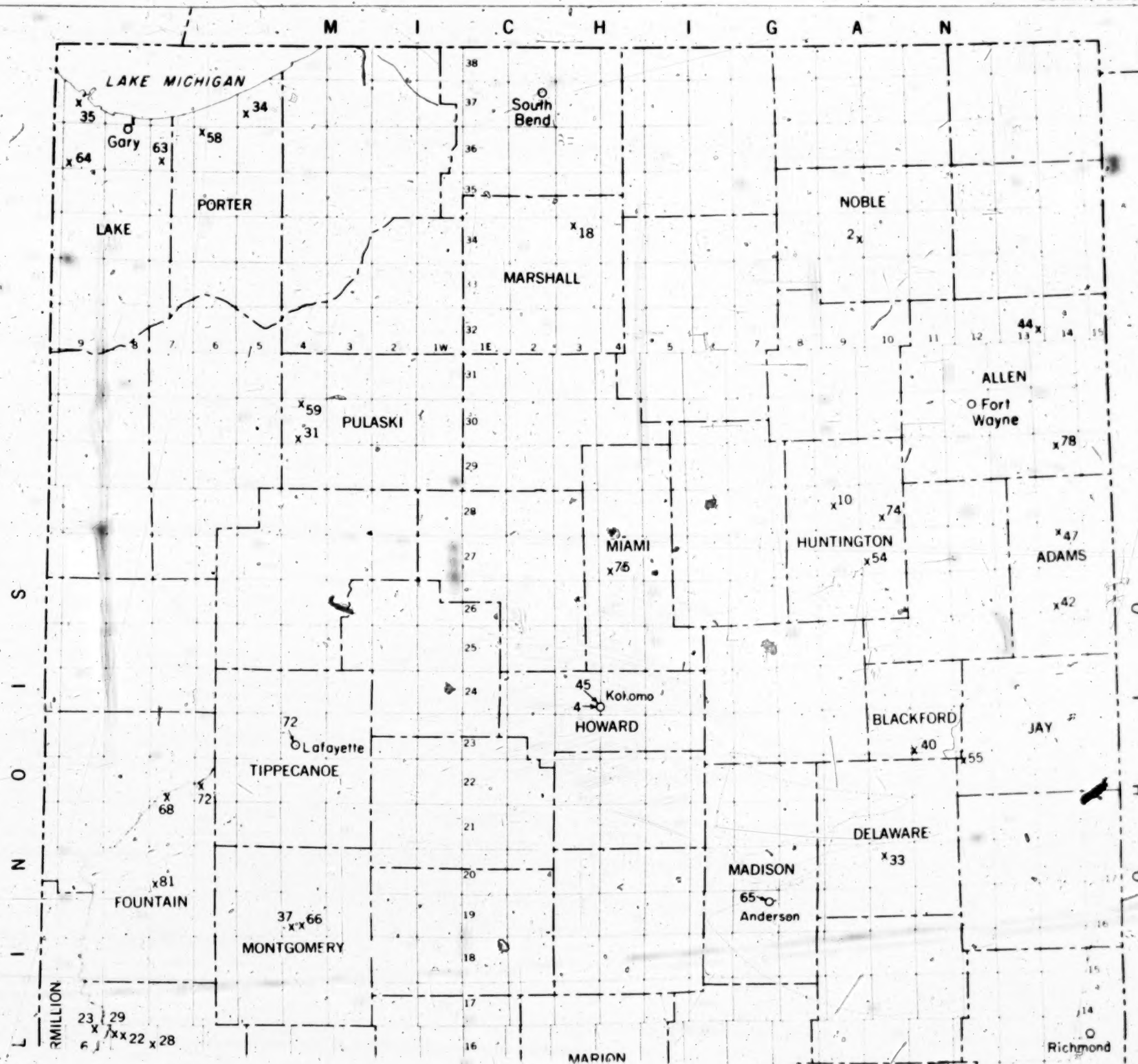
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Base  
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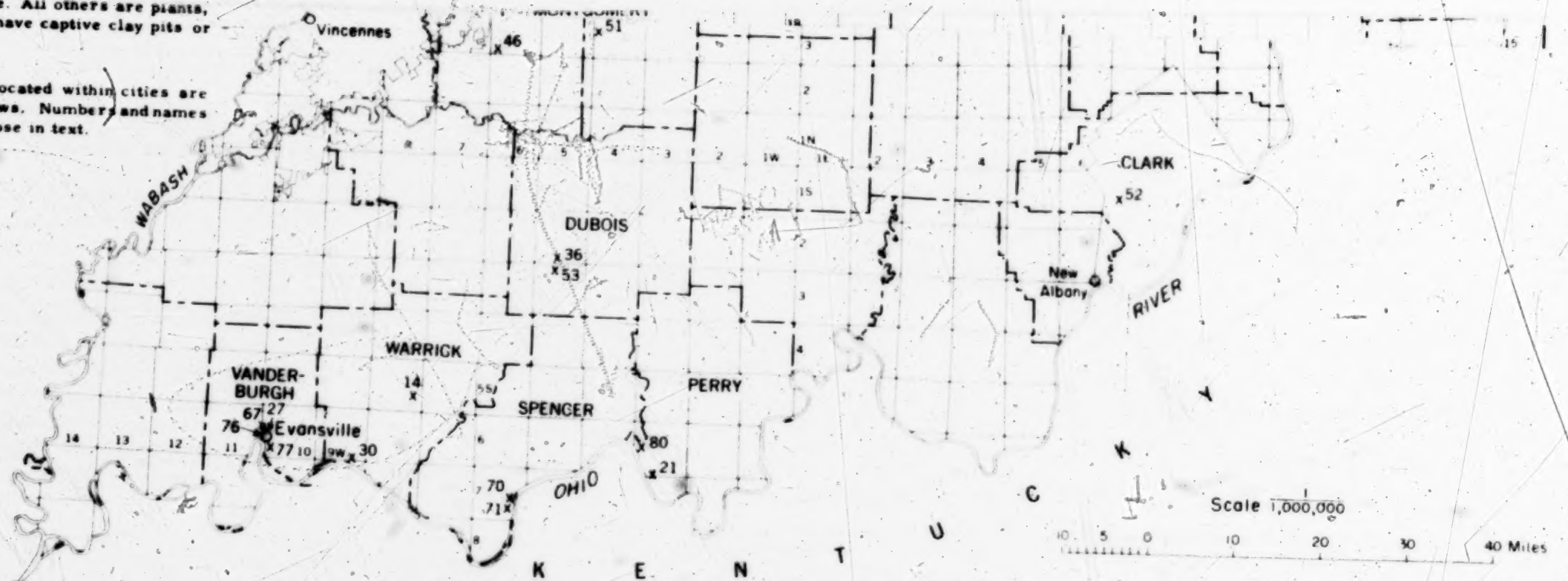
## NAMES OF PITS AND PLANTS

- 1 Adams Clay Products Company
- 2 Albion Tile Company
- 3 American Art Clay Company, Inc.
- 4 American Radiator and Standard Corporation
- 5 American Vitrified Products Company
- 6 Arketex Ceramic Corporation
- 7 Arketex Ceramic Corporation Plant No. 2
- 8 Arketex Ceramic Corporation Plant No. 3
- 9 Arketex Ceramic Corporation Plant No. 4
- 10 Art Chemical Products, Inc.
- 11 Ayer-McCarel-Reagen Clay Company
- 12 Big Bend Collieries
- 13 Bloomfield Brick Company
- 14 Boonville Clay Products, Inc.
- 15 Brazil Clay Company Plant No. 1
- 16 Brazil Clay Company Plant No. 2
- 17 Brazil Hollow Brick and Tile Company, Inc.
- 18 Bremen Clay Products Company
- 19 Brooklyn Brick Company, Inc.
- 20 Brown Coal Company
- 21 Cannelton Sewer Pipe Company
- 22 Cayuga Brick and Tile Corporation
- 23 Cayuga Brick Corporation
- 24 Clay City Pipe Company
- 25 Clay City Pipe Company
- 26 Clay City Pottery
- 27 Crown Pottery Company, Inc.
- 28 Dee Clay Products Company, Inc.
- 29 Durham and Heidbrieder Clay Company
- 30 Engle Studio, Inc.
- 31 Francesville Drain Tile Company
- 32 G. and F. Coal Company
- 33 Gill Clay Pottery Company
- 34 Hannell Pottery Company
- 35 Harbison-Walker Refractory Company
- 36 Huntingburg Brick Company
- 37 Hydraulic Press Brick Company
- 38 Indiana Drain Tile Company
- 39 Indiana State Farm
- 40 Inman Tile Company
- 41 Jackson Brick and Hollow Ware Company
- 42 Jones Tile Company
- 43 Kalamazoo Clay Company
- 44 Klopfenstein Tile Company
- 45 Kokomo Sanitary Pottery Company
- 46 Kretz Brick Company
- 47 Krick-Tyndall Company
- 48 Lehigh Cement Company
- 49 Log Cabin Coal Company
- 50 Log Cabin Cement Corporation



• Clay pit or mine. All others are plants, many of which have captive clay pits or mines.

Pits and plants located within cities are indicated by arrows. Numbers and names correspond to those in text.



Scale 1,000,000

10 5 0 10 20 30 40 Miles

Base from Map of Indiana, 1950 edition, published by U. S. Geological Survey. Minor revisions and additions made from Indiana Department of Conservation, Geological Survey, county base maps.

# MAP OF INDIANA SHOWING LOCATION OF PRODUCERS AND CONSUMERS OF CLAY AND SHALE

Compiled by H. H. Murray  
November 1954

[fol. 285] PLAINTIFF'S EXHIBIT 13

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
INDIANA INDIANAPOLIS DIVISION

No. IP 57-C-163

CANNELTON SEWER PIPE COMPANY, a Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

STIPULATION OF FACTS No. 1

It is hereby stipulated and agreed by plaintiff and defendant in the above entitled cause that the following facts are true and may be used as evidence on the trial of this cause, subject, however, to the right of either party to object to the relevancy or materiality of any fact stated herein, and subject, further, to the right of either party to introduce further evidence not inconsistent with any of the facts stated herein.

The Court has jurisdiction of the parties and the subject matter of this cause of action.

Plaintiff is a corporation organized and existing under the laws of the State of Indiana, and has its principal office and place of business in the City of Cannelton, Perry County, Indiana, which is within the district of this Court.

According to "Standard Specifications for Standard Strength Clay Sewer Pipe", adopted by the American [fol. 286] Society for Testing Materials in 1954, the following definitions defined the materials referred to:

(a) Clay pipe shall be manufactured from surface clay, fire clay, or shale, or a combination of these materials;



(b) **Surface Clay** is an unconsolidated, unstratified clay,<sup>1</sup> occurring on the surface;

(c) **Fire Clay** is sedimentary clay<sup>1</sup> of low flux content;

(d) **Shale** is a thinly stratified, consolidated, sedimentary clay<sup>1</sup> with wellmarked cleavage parallel to the bedding.

4

Plaintiff, during the fiscal year ending November 30, 1951, was engaged in the business of mining a mixture of clay and shale from an underground mine located in Perry County, Indiana, and of making vitrified sewer pipe, flue lining and related products from the same, in a pipe plant owned by plaintiff in the City of Cannelton, Perry County, Indiana, which pipe is sold by plaintiff to various users throughout the Central United States.

5

All of the clay and shale which plaintiff mined during its fiscal year ending November 30, 1951 was used by plaintiff in making vitrified sewer pipe and other products in its said plant, except for 79.265 tons of ground fire clay and shale sold in bags,

[fol. 287]

6

This action is brought for the recovery of income and excess profits taxes paid by plaintiff to defendant and for interest paid thereon for plaintiff's taxable fiscal years ending on November 30th in each of the years 1950 and 1951, in the following amounts:

	Tax	Interest	Total
1950 .....	\$ 3,487.72	\$ 25.78	\$ 3,513.50
1951 .....	53,649.93	3,911.85	57,561.78
Total taxes and interest .....			\$61,075.28

<sup>1</sup> The definitions for the term "surface clay", "fire clay", and "shale" are based on the following definition for the term "clay": Clay.—An earthy or stony mineral aggregate consisting essentially of hydrous silicates of alumina, plastic when sufficiently pulverized and wetted, rigid when dry, and vitreous when fired at a sufficiently high temperature.

In each of the above years, plaintiff kept its books on a fiscal year basis ending November 30th and upon the accrual basis method of accounting.

The amounts claimed by plaintiff for the fiscal year ending November 30, 1950 were paid by plaintiff to defendant as follows: \$3,363.15 on October 31, 1957, and \$150.35 on September 2, 1954.

The amounts claimed by plaintiff for the fiscal year ending November 30, 1951 were paid by plaintiff to defendant as follows: \$16,825.56 on May 13, 1952, and \$40,736.22 on July 13, 1954.

7

All of the processes used and applied by plaintiff to the clay and shale which it mined and used, were the usual and customary processes applied by manufacturers of vitrified sewer pipe and related vitrified products.

8

If, but only if, plaintiff is sustained in its contention that its first commercially marketable mineral product is the finished vitrified sewer pipe and related products sold by plaintiff, and that its clay product is fire clay, the computation of plaintiff's allowable depletion as shown on Exhibit A attached to plaintiff's complaint is correct, and the [fol. 288] computation of income and excess profits taxes due by plaintiff to defendant for the fiscal year ending November 30, 1951 shown on Exhibit B attached to plaintiff's complaint is correct, and the excess profits tax computation for plaintiff's fiscal year ending November 30, 1950 results in a refund of taxes being due to the plaintiff in the total amount of \$3,487.72, together with interest paid thereon in the amount of \$25.78 as set out in plaintiff's complaint.

If, but only if, plaintiff is not sustained in such contention, plaintiff's allowable depletion and the income and excess profits taxes due to defendant for plaintiff's fiscal years ending November 30, 1950 and November 30, 1951 will have to be re-computed. It is anticipated that the amount of any judgment to be entered by the Court pursuant to the pro-



visions of this paragraph, will be agreed upon by the parties once the above issues are resolved.

Royse and Travis, 1101 Fletcher Trust Building, Indianapolis 4, Indiana. By Howard P. Travis, Attorneys for Plaintiff. Don A. Tabbert, United States Attorney, By Don A. Tabbert, Attorney for Defendant.

[fol. 289] GOVERNMENT'S EXHIBIT C

CANNELTON SEWER PIPE COMPANY—Cannelton, Ind.

To: Mr. E. F. Clemens  
Subject: Clay Cost for fiscal year ending  
November 30, 1951.  
Total Tons Mined 38,474.

Date: March 10, 1958.  
From: Chester  
Reference:

	Total Costs	Cost Per Ton
Royalty .....	\$7,700 65	2002
Explosives .....	5,840 53	1518
Payroll .....	50,754 70	1 3192
Compensation Insurance .....	2,094 79	0544
Payroll Taxes .....	1,711 35	0445
Mine Expense .....	15,938 12	4143
Motor Truck Hauling Expense .....	5,017 73	1304
Depreciation .....	1,420 87	0369
Insurance .....	253 40	0066
Light and Power .....	1,992 55	0518
Group Insurance .....	323 73	0084
Totals .....	<u>93,048 42</u>	<u>2 4185</u>

GOVERNMENT'S EXHIBIT C—Continued

CANNELTON SEWER PIPE COMPANY—Cannelton, Ind.

To: Mr. E. F. Clemens  
Subject: Clay Costs for following years.

Date March 10, 1958  
From: Chester  
Reference:

Year	Total Tons Mined	Total Costs	Cost per Ton
1952 .....	37,118	\$84,120 58	2 2932
1953 .....	36,900	69,048 96	1 8713
1954 .....	36,600	69,916 14	1 9103
1955 .....	43,814	88,475 09	2 0193

[fol. 290]

## GOVERNMENT'S EXHIBIT I

L. R. Chapman

Phone 25

L. R. CHAPMAN, Inc.  
Lewisport, Kentucky  
Dec. 1, 1949

List of Coal Invoices hauled to the Owensboro Sewer Pipe  
by L. R. Chapman, Inc., for the month ending Nov. 30, 1949 incl.  
Coal @ \$4.25 per ton.

	Tons		Ticket No's.
1.	44.20	\$ 188.23	12591-83-12612-30-41.
2.	54.48	231.54	12753-16-12680-72-12736-12720
4.	33.31	141.57	12878-84-12919-31
5.	6.60	28.05	12953
6.	40.65	172.76	13038-49-76-86-91
7.	43.80	186.16	13170-58-38-28-13095
8.	44.81	190.44	13176-13232-33-13179-13205
10.	40.03	170.13	13303-13287-88-57-44
11.	26.95	114.54	13318-13-41
14.	43.60	185.30	13445-33-32-19-15
15.	60.10	255.43	13503-1-13490-8480-63-62
16.	17.44	74.12	13519-13525
17.	44.01	187.04	13550-59-79-80-87
18.	44.30	188.28	13630-21-17-13598-94
21.	49.50	210.38	13716-17-40-49-01-75
22.	31.56	134.13	13830-11-04-13790
23.	76.20	324.23	13856-63-87-13900-10-12-13-15-16
25.	51.06	217.01	13941-50-68-72-97-14002
	10.00	42.50	14034
28.	51.98	220.92	14064-66-88-96-99-14145
29.	52.25	222.06	14166-51-48-44-26-25
30.	41.96	178.33	14180-84-14204-20-22
	908.97	\$3,863.12	

	Clay or Shale Tons @ \$1.40 per ton		Ticket No's.
3.	44.11	\$ 61.75	12760-78-12815-17-58
	236.55	331.17	13021-19-18-13-12-07-06-05-02-
			(1290-91 03-12997-88-87-96
11.	113.77	159.28	13366-65-62-61-60-59-58-54-53-
			52-51-50
19.	58.75	82.25	13706-10-11-05-13696-95
	8.40	11.76	13712
26.	154.80	216.72	14013-15-16-17-19-26-25-27-30-32
	616.38	\$ 862.93	

Oct. Balance 338.14  
Coal 908.97 tons = \$3,863.12  
Clay or Shale 616.38 tons = 862.93  
Total Balance \$5,064.19

## [fol. 291] GOVERNMENT'S EXHIBIT I—Continued

L. R. Chapman

Phone 25

L. R. CHAPMAN, INC.  
Lewisport, Kentucky  
January 4, 1949

Coal sold to Owensboro Sewer Pipe Co.  
Owensboro, Kentucky

"Coal"	1680340 lbs. or 840.17 tons	
	840.17 x \$4.25	\$3,570.72
Mining & Hauling Clay		
"Clay"	3471740 lbs. or 1735.87 tons	
	1735.87 x \$1.40	2,430.22
Total Amount Due		\$6,000.94

[fol. 292]

## GOVERNMENT'S EXHIBIT J

L. R. Chapman

Phone 25

L. R. CHAPMAN, INC.  
Lewisport, Kentucky  
Feb. 1, 1950

List of Coal & Clay Invoices that was hauled to the  
Owensboro Sewer Pipe Co. for the month of Jan. 1950 incl.

Coal Invoices	No. Lbs.	Clay Invoices	No. Lbs.
2. 15829	12,140	11. 16112	14,780
15831	19,550	16144	15,750
3. 15855	18,800	16147	16,270
15851	11,680	16145	14,440
4. 15876	12,780	16149	10,310
15881	19,220	16154	13,420
5. 15906	19,200	16158	15,990
15907	12,600	12. 16155	14,160
15898	18,080	16151	12,700
6. 15930	17,440	16143	14,330
15942	19,000	16140	13,860
15937	12,400	16141	15,940
7. 15954	10,630	16153	15,150
15951	18,400	16156	14,600
15961	18,100	16157	14,960
9. 16020	19,000	16146	15,210
16034	19,800		
16055	18,900		231,870 lbs.
10. 16066	18,690		
11. 16091	19,690		
16124	18,800		231,870 lbs. = 115.93 tons
16107	18,600		115.93 tons @ \$1.40 = \$162.30
16133	17,860		
9. 16015	11,390		
16067	10,950		
16088	11,530		
	425,230 lbs.	Coal	\$ 903.59
425,230 lbs. = 212.61 tons		Clay	162.30
212.61 tons Coal @ \$4.25 = \$903.59		Total Sales	\$1,065.89

[fol. 293] IN THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

**Supplemental Appendix to Appellee's Brief**

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
INDIANA, INDIANAPOLIS DIVISION

IP 57-C-163

CANNELTON SEWER PIPE COMPANY, a Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT FOR THE RECOVERY OF TAXES PAID

First Cause of Action

1

Plaintiff brings this action against the defendant, United States of America, pursuant to the provisions of Section 1346(a)(1) of Title 28 of the United States Code, Act of June 25, 1948, C. 646, 62 Stat. 933, as amended by the Act of May 24, 1949, C. 139 Sec. 80(a), 63 Stat. 101, and the Act of July 30, 1954, C. 648, Sec. 1, 68 Stat. 589. Said section of the United States Code, as amended, confers jurisdiction on this Court over the cause of action alleged by the plaintiff herein.

2

Plaintiff is a corporation organized and existing under the laws of the State of Indiana, and has its principal office and place of business in the City of Cannelton, Perry County, Indiana, which is within the district of this Court.

[fol. 294]

3

Plaintiff brings this action to recover excess profits tax paid for the fiscal year ending November 30, 1950 in the amount of \$3487.72, and to recover income tax paid for the fiscal year ending November 30, 1951 in the amount of

\$53,649.93, and of interest paid by plaintiff on the tax collected for the fiscal year ending November 30, 1951, in the amount of \$3,911.85.

4

Plaintiff has at all times kept its books and reported its income on the basis of a fiscal year ending on November 30th in each year. Within the time allowed by law, plaintiff filed with the Collector of Internal Revenue at Indianapolis, Indiana, its income and excess profits tax returns for the fiscal year ending November 30, 1950. Such returns showed income tax liability of \$66,003.64 and excess profits tax liability of \$3,363.15. Such amounts of income and excess profits tax liability were paid by plaintiff on the following dates, to-wit: Feb. 5, 1951, \$16,500.91; Mar. 8, 1951, \$2,000.00; May 14, 1951, \$16,500.91; Aug. 9, 1951, \$17,023.27; Nov. 1, 1951, \$17,341.70.

5

Thereafter, on August 15, 1952, plaintiff filed its claim for refund of excess profits taxes paid, as recited in Paragraph 4, Supra, which claim was for the amount of \$1,181.49; and prior to any action being taken on said claim by the Commissioner of Internal Revenue, plaintiff filed, on or about July 14, 1954, its amended claim for refund of such excess profits taxes in the amount of \$3,363.15.

[fol. 295]

6

On August 17, 1954, the District Director of Internal Revenue, acting for the Commissioner of Internal Revenue, disallowed such claims for refund and notified plaintiff thereof by registered mail as required by Section 3772(a) (2) of the Internal Revenue Code of 1939.

7

On July 30, 1954, the Commissioner of Internal Revenue notified plaintiff by registered mail of a deficiency assessment against plaintiff for excess profits tax for the fiscal year ending November 30, 1950, in the amount of \$124.57. This deficiency assessment was paid by plaintiff, together with interest thereon in the amount of \$25.78, on August 26, 1954.

87

Within the time allowed by law, plaintiff filed its income and excess profits tax returns for the fiscal year ending November 30, 1951. Such returns showed income tax liability of \$95,899.57 and excess profits tax liability of \$17,238.55. Thereafter, on or about August 15, 1952, plaintiff filed its amended income and excess profits tax returns for such fiscal year. Such amended returns showed income tax liability of \$62,242.08 and no liability for excess profits tax. Payments were made by plaintiff on account of the tax liability shown on its original returns for such year in the total amount of \$67,966.63 on the following dates, to-wit: \$34,025.20 on February 8, 1952, and \$33,941.43 on May 9, 1952.

[fol. 296]

9

Plaintiff, on August 15, 1952, filed its claim for refund of income and excess profits taxes paid, as recited in Paragraph 8, Supra, and, prior to an action being taken on said claim by the Commissioner of Internal Revenue, filed its amended claim for refund and abatement of taxes paid or assessed, as recited in Paragraph 8, Supra, on September 4, 1952, such amended claim being for the abatement of taxes shown on plaintiff's original return filed for such fiscal year ending November 30, 1951, in the amount of \$45,171.49, and for refund of such taxes already paid in the amount of \$5,724.55. The amounts claimed by plaintiff to be abated or refunded were such as to bring plaintiff's liability for such fiscal year to the amount shown on plaintiff's amended returns filed on August 15, 1952, as heretofore alleged.

10

On July 1, 1954, the Acting Regional Commissioner of the Cincinnati Region of the Internal Revenue Service notified plaintiff that its amended returns for the fiscal year ending November 30, 1951, and the amended claim for refund and abatement, had been carefully considered and as a result thereof the claim for refund and abatement was being disallowed; that a certificate of over-assessment of the liability shown on plaintiff's original returns for such year would be issued in the amount of \$8,347.12, reducing



plaintiff's total tax liability for such year from \$113,138.12 to \$104,791.00; and that a deficiency in payment of such taxes existed in the amount of \$36,824.37.

4 [fol. 297]

11

On July 10, 1954 a notice of tax due was sent to plaintiff by the Director of Internal Revenue in the amount of \$36,824.37, and an additional amount of interest thereon in the amount of \$3,911.85, which amounts were duly paid by plaintiff on July 12, 1954.

12

On or about July 15, 1954, before any action was taken by the Commissioner of Internal Revenue on the original or amended claims for refund filed by plaintiff for its fiscal year ending November 30, 1951, as alleged in Paragraph 9, Supra, plaintiff filed its Second Amended Claim for Refund of income and excess profits taxes actually paid by it for such fiscal year, such claim being for the amount of \$61,932.56.

13

On October 14, 1954, the District Director of Internal Revenue, acting for the Commissioner of Internal Revenue, disallowed all of plaintiff's claims for refund for the fiscal year ending November 30, 1951 and notified plaintiff thereof by registered mail as required by Section 3772(a) (2) of the Internal Revenue Code.

14

The difference between the taxes due as computed by plaintiff and as assessed by the Commissioner of Internal Revenue arises by reason of a different theory being used to compute the deduction for depletion to which plaintiff is entitled because of its mining of fire clay and shale, as authorized by Sections 23(m) and 114(b)(4)(A), as amended, of the Internal Revenue Code of 1939.

[fol. 298]

15

Plaintiff is engaged in the business of mining a mixture of fire clay and shale from an underground mine located in Perry County, Indiana, and of making vitrified sewer

pipe, flue lining and related products from the same, in a pipe plant owned by plaintiff in the City of Cannelton, Perry County, Indiana, which pipe is sold by plaintiff to various users throughout the Central United States.

## 16

Section 23(m) of the Internal Revenue Code of 1939 provides that in computing net income, there shall be allowed as a deduction a reasonable allowance for depletion in the case of "mines, oil and gas wells, other natural deposits, and timber."

Effective on and after January 1, 1951, Section 114(b) (4)(A) of the Internal Revenue Code of 1939, as amended, provides that "the allowance for depletion under Section 23(m) in the case of the following mines and other natural deposits shall be—(i) in the case of \* \* \* shale, \* \* \* 5 per centum, \* \* \* (iii) in the case of \* \* \* refractory and fire clay, \* \* \* 15 per centum, of the gross income from the property during the taxable year, excluding from such gross income any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property \* \* \*."

The term "gross income from the property" as used in Section 114(b)(4)(A), quoted above, is defined in Section 114(b)(4)(B) which provides that "'gross income from the property' means the gross income from mining. The term 'mining' as used herein shall be considered to include [fol. 299] not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products."

## 17

The mine from which plaintiff mines the clay used to make sewer pipe contains a mixture of shale and fire clay. The clay so mined and used by plaintiff for making sewer pipe during the fiscal year ending November 30, 1951 was in the proportion of forty (40%) percent shale and sixty (60%) percent fire clay. The total clay mined and used by

plaintiff during such fiscal year amounted to 38,473 tons, of which 15,389 tons were shale and 23,084 tons were fire clay.

## 18

All of the fire clay and shale mined by plaintiff is sold by it in the form of vitrified sewer pipe, except for a negligible amount sold as ground fire clay for use in laying fire-brick and for other refractory purposes. During the fiscal year ending November 30, 1951, plaintiff's net sales of all products sold by it amounted to \$1,409,145.66. Of this amount, the sale of ground fire clay amounted to \$1,822.45.

## 19

Except for negligible amounts, there is no market for the fire clay and shale mined by plaintiff before it is put in the form of vitrified sewer pipe. Such vitrified sewer pipe sold by plaintiff is the first "commercially marketable mineral product" mined or produced by plaintiff and all mining and other processes employed by plaintiff to produce such product are those normally employed by mine operators in order to obtain such product.

[fol. 300]

## 20

In order to produce vitrified clay sewer pipe and related products from the raw fire clay and shale, the plaintiff applies the following processes:

A. The fire clay and shale are mined in the proportion of 60% fire clay and 40% shale from an underground horizontal drift mine, transported to the surface, loaded into dump trucks, and transported from the mine opening to the factory, a distance of 1.8 miles to plaintiff's plant.

B. The fireclay-shale mixture is crushed to approximately egg-size and stored for blending purposes.

C. The mixture is then reclaimed from storage by conveyor belt, and fed into dry pans where it is further reduced to fine-grain or powder by grinding.

D. Ground clay discharged from the dry grinding pans is carried by bucket elevator to screens, where it is screened to desired size for manufacturing into pipe, with fine-grain going to storage bins and over-size returning to the dry grinding pan.

E. The finely ground mixture is fed from storage bins to either wet pans or a pug mill for tempering with water.

F. After tempering in wet pans, the clay is conveyed to vertical steam presses where it is extruded under vacuum through dies to form sewer pipe, flue lining, wall coping, and related products.

G. Clay prepared in the pug-mill is fed continuously under vacuum into a horizontal extrusion machine which extrudes clay through a die to form sewer pipe, flue lining, filter block, drain tile, and related products.

H. Products formed on the steam press or horizontal extrusion machine are transported to drying rooms where they are dried at varying rates of speed, depending on [fol. 301] size and shape, to remove water mechanically added in the pugging process.

I. From the dry rooms the pipe is transported to and loaded in round down-draft kilns for firing.

J. Ware is fired in these kilns at varying rates of time depending on size and shape until it is vitrified.

K. When vitrification is complete, salt is injected into the kiln and a salt glaze is produced on the surface of the pipe.

L. The finished product is allowed to cool, drawn from the kilns, sorted, stored and loaded for shipment.

## 21

The plaintiff is entitled to compute its allowable deduction for depletion for the period from January 1, 1951 to November 30, 1951 on the basis of the allowable statutory percentages of its gross sales of vitrified sewer pipe, which is 15% of 60% of such sales as fire clay, and 5% of 40% of such sales as shale, limited, however, to 50% of the net income from the property. A computation showing plaintiff's correct allowable depletion for such period is attached hereto as Exhibit A, and such depletion deduction is in the amount of \$88,908.13.

## 22

On the basis of plaintiff's allowable depletion for the period from January 1, 1951 to November 30, 1951, as shown in Exhibit A hereto, the total income tax for which plaintiff was liable for the fiscal year ending November 30,

1951, was in the amount of \$51,141.07, as shown on Exhibit B attached hereto.

[fol. 302]

23

The Commissioner of Internal Revenue originally assessed the plaintiff for income and excess profits taxes for the fiscal year ending November 30, 1951 in the amount of \$113,138.12, which was reduced by certificate of over-assessment issued September 14, 1954 to the amount of \$104,791.00. The Commissioner refused to allow plaintiff the 15% depletion deduction provided by law on any products sold by plaintiff during such fiscal year except on the amount of \$484.74 of ground fire clay sold by plaintiff in bags. The Commissioner also determined that certain of the processes listed by plaintiff in Paragraph 24, Supra, were manufacturing rather than mining processes, and that the income attributable to such processes should be excluded from "gross income from the property". The Commissioner computed plaintiff's allowable depletion deduction for the period from January 1, 1951 to November 30, 1951 as \$10,761.26, which was the entire depletion deduction allowed to plaintiff for the fiscal year ending November 30, 1951.

24

In the excess profits tax return filed by plaintiff for its fiscal year ending November 30, 1950, plaintiff showed an excess profits net income of \$199,689.06 and an excess profits credit of \$142,227.24. Because of the depletion allowance to which plaintiff is entitled for the fiscal year ending November 30, 1951 as hereinbefore alleged, which results in a reduction of plaintiff's excess profits net income for such year to \$110,780.93, plaintiff is entitled to carry back to the fiscal year ending November 30, 1950 the unused excess profits credit from the fiscal year ending November 30, 1951 in the amount of \$31,446.31, and this amount of unused excess profits credit, being greater than the ad-[fol. 303] justed excess profits net income for the fiscal year ending November 30, 1950, results in plaintiff having no adjusted excess profits net income for the year ending November 30, 1950, and plaintiff, therefore, owed no excess profits tax for such year.

## 25

The Commissioner of Internal Revenue originally assessed the plaintiff for excess profits taxes for the fiscal year ending November 30, 1950 in the amount of \$3,363.15, as shown on plaintiff's original excess profits tax return filed for such year. The Commissioner thereafter refused to allow plaintiff's claim for refund of such excess profits taxes and assessed the plaintiff an additional amount of excess profit tax for such year of \$124.57.

## 26

The action of the Commissioner as described in Paragraph 23, supra, in excluding certain of plaintiff's income in the fiscal year ending November 30, 1951 from "gross income from the property" and in reducing plaintiff's deduction for depletion in such year to \$10,761.26 was erroneous, illegal and without warrant in law.

## 27

The action of the Commissioner as described in Paragraph 25, supra, in refusing to allow for plaintiff's fiscal year ending November 30, 1950 the unused excess profits credit carry-back from the fiscal year ending November 30, 1951 in the amount of \$31,446.31 and the assessment of additional excess profits tax for the fiscal year ending November 30, 1950 in the amount of \$124.57, was erroneous, illegal and without warrant in law.

[fol. 304]

## 28

By reason of the facts set forth in this complaint in regard to the taxes due and owing by the plaintiff for its fiscal year ending November 30, 1951, there is now due and owing to the plaintiff from the defendant the sum of \$57,561.78, together with interest thereon as provided by law from the dates of payment thereof, which amounts and dates of payment were—the sum of \$16,825.56 on May 9, 1952, and \$40,736.22 on July 10, 1954. Such sum of \$57,561.78 was erroneously and illegally collected from plaintiff as income and excess profits taxes and interest thereon for such fiscal year. Although repayment thereof has been demanded, no part of such sum of \$57,561.78 has



been credited, remitted, refunded or repaid to the plaintiff or to anyone on its account.

## 29

By reason of the facts set forth in this complaint in regard to the taxes due and owing by the plaintiff for its fiscal year ending November 30, 1950, there is now due and owing the plaintiff from the defendant the sum of \$3,487.72, together with interest thereon as provided by law from the dates of payment thereof, which amounts and dates of payment were—the sum of \$3,363.15 on November 1, 1951, and the sum of \$150.35 on August 26, 1954. Such sum of \$3,487.72 was erroneously and illegally collected from plaintiff as excess profits tax and interest thereon for such fiscal year. Although repayment thereof has been demanded, no part of such sum of \$3,487.72 has been credited, remitted, refunded or repaid to the plaintiff or to anyone on its account.

[fol. 305]

## 30

On the 17th day of July, 1956, the Commissioner of Internal Revenue and the plaintiff entered into an agreement to suspend the running of the statute of limitations for bringing suit by plaintiff for the recovery of the taxes alleged to have been overpaid for each of the fiscal years ending November 30, 1950 and November 30, 1951, by the terms of which the running of the statute of limitations as specified in Section 6532 of the Internal Revenue Code of 1954 was suspended from the said 17th day of July, 1956 to August 31, 1957. A copy of said agreement for the fiscal year ending November 30, 1950 is attached hereto and marked "Exhibit C". A copy of said agreement for the fiscal year ending November 30, 1951 is attached hereto and marked "Exhibit D". The filing of this action is, therefore, within the time allowed by law.

Wherefore, plaintiff prays for judgment against the defendant in the principal amount of \$61,049.50 and interest thereon as provided by law from the dates of payment thereof as hereinabove specified, together with the costs of this action.

Royse and Travis, 1011 Fletcher Trust Building,  
Telephone—Melrose 2-4417. By Howard P. Travis,  
Attorneys for Plaintiff.

[fol. 306]

## Second Cause of Action

1

As part of its Second Cause of Action, plaintiff hereby re-alleges and re-avers each and all of the factual allegations set forth in plaintiff's First Cause of Action in rhetorical paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 23, 25, 26, 27, 29 and 30 thereof.

2

During the period January 1, 1951 to November 30, 1951, plaintiff sold a certain amount of its production of fire clay and shale in the form of ground fire clay in bags of 100 pounds and 10 pounds, and the total tonnage so sold by plaintiff amounted to 79,625 tons. The average sales price per ton of such ground fire clay so sold by plaintiff was \$17.464.

3

If, but only if, plaintiff is not entitled to compute its allowable deduction for depletion on the basis of the net sales of vitrified sewer pipe and other products produced by plaintiff, all as set out in plaintiff's First Cause of Action herein, then plaintiff is entitled to compute its allowable depletion deduction on the basis of the use by plaintiff of the tonnage of fire clay and shale used to produce vitrified sewer pipe and other products all at a price of \$17,464 per ton. During the fiscal year ending November 30, 1951, plaintiff mined and used in producing vitrified sewer pipe and other products a total of 38,473 tons of fire clay and shale, of which 23,084 tons was fire clay and 15,389 tons was shale. Plaintiff is entitled to a depletion deduction of 15% of the value of such fire clay and 5% [fol. 307] of the value of such shale, and plaintiff's allowable depletion deduction for the fiscal year ending November 30, 1951, computed on the theory set out in this paragraph, is in the amount of \$66,857.05.

4

On the basis of plaintiff's allowable depletion deduction for the period from January 1, 1951 to November 30, 1951 as set out in this cause of action, the total income tax for

which plaintiff was liable for the fiscal year ending November 30, 1951, was in the amount of \$62,242.08, and plaintiff is entitled to recover from the defendant all of the amount paid by plaintiff in excess of such sum, together with interest thereon as provided by law.

Wherefore, plaintiff prays for judgment against the defendant in such sum as is proper under the theory alleged in this cause of action, together with interest as provided by law, from the dates of payment of taxes by plaintiff as hereinabove alleged, together with the costs of this action.

Royse and Travis, 1011 Fletcher Trust Building,  
Telephone—Melrose 2-4417, By Howard P. Travis,  
Attorneys for Plaintiff.

[fol. 308] IN THE UNITED STATES DISTRICT COURT.

• • (Caption 57-C-163) • • •

#### ANSWER.

Comes now the United States of America by its attorney Jack C. Brown, United States Attorney for the Southern District of Indiana, and answers the allegations of the complaint as follows:

#### First Cause of Action

1

Admits the allegations contained in paragraph 1 of the complaint.

2

Admits the allegations contained in paragraph 2 of the complaint.

3

Admits the allegations contained in paragraph 3 of the complaint, except that any liability is denied thereunder.

4

Admits the allegations contained in paragraph 4 of the complaint. Defendant avers that the amounts of income

and excess profits tax liability in the amounts alleged were paid by plaintiff for the fiscal year ending November 30, 1950, on the following dates, to wit: February 9, March 15, June 20, August 10, and October 31, 1951.

[fol. 309]

5

Admits the allegations contained in paragraph 5 of the complaint, except it is not intended to admit any of the allegations set forth in said claim for refund not expressly admitted elsewhere in this answer.

6

Admits the allegations contained in paragraph 6 of the complaint.

7

Admits the allegations contained in paragraph 7 of the complaint. Defendant avers the alleged deficiency assessed was paid by plaintiff together with interest thereon on September 2, 1954.

8

Admits the allegations contained in paragraph 8 of the complaint. Defendant avers that the amounts of income and excess profits tax liability in the amounts alleged were paid by plaintiff for the fiscal year ending November 30, 1951, on the following dates, to wit: February 21, and May 13, 1952.

9

Denies the allegations contained in paragraph 9 of the complaint, except it is admitted that on August 15, 1952, plaintiff filed its claim for refund of income and excess profits taxes paid for the fiscal year ending November 30, 1951, and that prior to any action being taken on said claim by the Commissioner of Internal Revenue, plaintiff filed its amended claim for refund on September 4, 1952, for the fiscal year ending November 30, 1951, except it is not intended to admit any of the allegations set [fol. 310] forth in the said claim for refund or the amended claim for refund not expressly admitted elsewhere in this answer.

10

Admits the allegations contained in paragraph 10 of the complaint.

11

Admits the allegations contained in paragraph 11 of the complaint. Defendant avers that the alleged amount of tax assessed and interest thereon were duly paid by plaintiff on July 13, 1954.

12

Admits the allegations contained in paragraph 12 of the complaint.

13

Admits the allegations contained in paragraph 13 of the complaint.

14

Denies the allegations contained in paragraph 14 of the complaint.

15

Denies the allegations contained in paragraph 15 of the complaint except it is admitted that plaintiff is engaged in the business of making vitrified sewer pipe, flue lining and related products from the same, in a pipe plant owned by plaintiff in the City of Cannelton, Perry County, Indiana, which pipe is sold by plaintiff to various users throughout the Central United States.

[fol. 311]

16

Denies the allegations contained in paragraph 16 of the complaint for the reasons that the applicable sections of the Internal Revenue Code of 1939 speak for themselves.

17

Denies the allegations contained in paragraph 17 of the complaint.

18

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the complaint.

19

Denies the allegations contained in paragraph 19 of the complaint.

20

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the complaint.

21

Denies the allegations contained in paragraph 21 of the complaint.

22

Denies the allegations contained in paragraph 22 of the complaint.

[fol. 312]

23

Denies the allegations contained in paragraph 23 of the complaint, except it is admitted that plaintiff reported on its income and excess profits tax return for the fiscal year ending November 30, 1951, taxable liability in the amount of \$113,138.12, which was reduced by the Commissioner of Internal Revenue by certificate of over-assessment issued September 14, 1954, to the amount of \$104,791; it is further admitted that the Commissioner computed plaintiff's allowable depletion deduction for the period January 1, 1951, to November 30, 1951, as \$10,761.26 which was the entire depletion deduction allowed to plaintiff for the fiscal year ending November 30, 1951.

24

Denies the allegations contained in paragraph 24 of the complaint.

25

Denies the allegations contained in paragraph 25 of the complaint, except it is admitted that plaintiff's original excess profits tax return filed for the fiscal year ending November 30, 1950, reported an excess profits tax liability of \$3,363.45 and it is further admitted that the Commissioner of Internal Revenue assessed the plaintiff an additional amount



of excess profits tax for the fiscal year ending November 30, 1950, in the amount of \$124.57.

26

Denies the allegations contained in paragraph 26 of the complaint.

[fol. 313]

27

Denies the allegations contained in paragraph 27 of the complaint.

28

Denies the allegations contained in paragraph 28 of the complaint except it is admitted that no part of the alleged sum of \$57,561.78 has been credited, remitted, refunded or repaid to the plaintiff or to anyone on its account.

29

Denies the allegations contained in paragraph 29 of the complaint except it is admitted that no part of the alleged sum of \$3,487.72 has been credited, remitted, refunded or repaid to the plaintiff or to anyone on its account.

30

Admits the allegations contained in paragraph 30 of the complaint.

### Second Cause of Action

1

Defendant realleges and reavers each and all of the allegations set forth in defendant's first cause of action in answer to rhetorical paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 23, 25, 26, 27, 29 and 30 thereof.

2

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.

[fol. 314]

3

Denies the allegations contained in paragraph 3 of the complaint.

4

Denies the allegations contained in paragraph 4 of the complaint.

Wherefore, defendant demands judgment be entered in its favor dismissing plaintiff's complaint with allowable costs.

Jack C. Brown, United States Attorney.

UNITED STATES DISTRICT COURT.

• • (Caption—57-C-163) • •

PRE-TRIAL ORDER.—ENTERED FEB. 12, 1958

A pre-trial conference was held in the above entitled cause before Honorable Cal J. Holder, Judge, on the 7th day of January, 1958.

Mr. Howard P. Travis of Indianapolis, Indiana, appeared as counsel for plaintiff; Mr. Ernest C. Friesen, Attorney, Tax Division, Department of Justice, Washington, D. C., and Mr. John Carl Vandivier, Jr., Assistant United States Attorney for the Southern District of Indiana, appeared as counsel for defendant.

I

In general, plaintiff claims that it is entitled to recover the sum of \$57,561.78, together with interest thereon as provided by law from the dates of payment thereof, on account of a deduction for depletion for the clay mined and used by plaintiff during the fiscal year ending November 30, 1951, [fol. 315] which deduction was disallowed to the plaintiff by the Commissioner of Internal Revenue of the defendant, plaintiff's claim being based on the provisions of Section 114 (b) (4) (B) of the Internal Revenue Code of 1939 as amended, and plaintiff claims an additional amount of \$3,487.72, together with interest thereon, as excess profits tax

paid by the plaintiff for the fiscal year ending November 30, 1950, by virtue of the decision in *United States v. Merry Brothers Brick and Tile Co., et al.*, 242 F. 2d 708, certiorari denied October 14, 1957.

## II

Counsel for the defendant represented to the court that the defendant, through its Internal Revenue Service, had initiated as of this date a survey regarding the sales of shale and fire clay in a certain marketing area which would include the location of the plaintiff's mine and factory, to determine whether or not the defendant will claim in this cause of action that plaintiff has a market for the clay which it mines prior to being put in the form of finished vitrified sewer pipe and other related products which are made and sold by the plaintiff; and further, that if the defendant determined that there was such a market, then an additional survey would be made to determine the market value of the clay mined by plaintiff at the point where the defendant determined that there was a market for the clay.

Counsel for the defendant further represented that if it were determined as a result of the survey that there was no market for clay and shale of the type mined or used by plaintiff prior to its being put in finished form ready for sale, then plaintiff's claims as alleged in plaintiff's complaint would be recommended for administrative refund by the Internal Revenue Service of defendant.

[fol. 316]

## III

Counsel for plaintiff represented that the clay which it mines and uses in its production of vitrified sewer pipe and other products consisted, during the period involved in this cause of action, of 40 per cent shale and 60 per cent fire clay having a pyrometrical cone equivalent of 17, and that plaintiff during the period involved made no sales of raw shale or fire clay but did make sales of ground fire clay in an amount of 79.625 tons out of a total amount of clay mined and used by plaintiff during the fiscal year ending November 30, 1951, of 38,473 tons.

## IV

If this cause of action is to be tried by the court, it was agreed between the parties that the only issues of fact which would have to be presented to the court would be first, whether the plaintiff has any "commercially marketable product or products" from the shale and clay which it mines prior to the finished vitrified sewer pipe and other products which plaintiff produces and sells; and, second, what is the value of such "commercially marketable product or products" if it is determined that plaintiff has such a product or products prior to the completed vitrified sewer pipe and other products which plaintiff makes and sells.

## V

At the request of counsel for defendant, and with the consent of counsel for plaintiff, the court stated that this cause would be removed from the trial calendar for January 13, 1958, and that if the case was to be tried by the court it would be reset in March, 1958, with at least one week's notice to counsel for plaintiff and defendant before the date set for trial.

[fol. 317]

## VI

The court instructed counsel for both parties that if the defendant decides to proceed with the trial of this cause, a stipulation of facts should be filed with the court in duplicate not later than February 15, 1958, and that trial briefs should be filed with the court by both parties not later than one week before the date set for trial.

## VII

The probable length of the trial of this case would be not more than one day.

Approved: Howard P. Travis, Attorney for Plaintiff.  
Don A. Tabbert, Attorney for Defendant.

Dated and entered at Indianapolis, Indiana, this 12th day of February, 1958.

Cale J. Holder, Judge.

[fol. 318] IN THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1958 — April Session, 1959

No. 12496

CANNELTON SEWER PIPE COMPANY, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

Appeal from the United States District Court for the  
Southern District of Indiana, Indianapolis Division.

OPINION—June 15, 1959

Before DUFFY, *Chief Judge*, HASTINGS and KNOCH, *Circuit Judges*.

HASTINGS, *Circuit Judge*. Taxpayer, Cannelton Sewer Pipe Company, brought this suit in the district court for a refund of income tax paid in 1951. The sole question before us is what constitutes the proper basis for the computation of percentage depletion to which taxpayer is entitled. At all times relevant to this proceeding, taxpayer was engaged, near Cannelton, Indiana, in the mining of fire clay and shale and the manufacture of vitrified clay sewer pipe and related products. Under provisions of the Internal Revenue Code of 1939,<sup>1</sup> taxpayer was permitted a percentage depletion on its fire clay of 15% and, on its shale, of 5% of "the gross in-[fol. 319] come from the property during the taxable year . . . ." 26 U.S.C.A. § 114(b)(4)(A) (1939 I.R.C.). The district court held that taxpayer could compute its deduction for depletion on the basis of its gross income from the sale of its finished products. The Government contends such holding is erroneous.<sup>2</sup>

<sup>1</sup> Reference to "the Code" in this opinion will be to the Internal Revenue Code of 1939.

<sup>2</sup> There was also before the trial court a question whether or not taxpayer's clay was "fire clay" but the Government has not taken issue in this appeal with the trial court's finding that taxpayer's product met the specifications of fire clay:

Section 114(b)(4)(B) of the Code provided, in pertinent part, that:

"The term 'mining' as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the *ordinary treatment processes normally applied by mine owners or operators* in order to obtain the *commercially marketable mineral product or products* \* \* \*"  
(Emphasis added.)

It is taxpayer's position that the processes by which it produced vitrified sewer pipe and related products from its raw fire clay and shale qualify as "ordinary treatment processes" within the meaning of the above statutory language since it had no market for its minerals in crude form and such processes were of necessity applied by it in order to obtain the first commercially marketable products. The Government urges that, in 1951, there was an existing substantial market for raw fire clay and shale in Indiana and in the area surrounding taxpayer's mine; and, that, in light of this fact, raw fire clay and shale were taxpayer's first commercially marketable products.

Taxpayer contends that the sole question on this appeal is whether there is substantial evidence to support the trial court's finding that vitrified sewer pipe and other finished products were taxpayer's first commercially marketable products. We do not agree that the issues are so limited. An overriding consideration is whether the trial court applied the correct legal criteria in making such a determination. The record clearly bears out the Government's assertion that there existed in Indiana, during 1951, a substantial market for fire clay and shale. At the same time, it is also apparent from the record [fol. 320] that taxpayer could not have sold its fire clay and shale in that market *at a profit* because of prohibitively high mining and transportation costs. The question squarely presented is thus whether the statutory language which defines, as a part of "mining", "all ordinary treatment processes normally applied by mine owners" to produce "the commercially marketable mineral product or products", includes all processes necessary by a taxpayer to obtain a product *which can be sold by it at a profit*. The



Government urges that "mining" includes only the processes necessary for a taxpayer to produce a product which, with the least processing, is "marketable", i.e., for which there is a market; and that it is not material whether or not it is economically feasible for a taxpayer to sell in that market. This theory presupposes that there would be a marketable or "depletable" product for each raw or crude mineral, and that the depletion allowance would be computed on this marketable or depletable product.<sup>3</sup>

The Government has attempted, in a number of cases and with conspicuous lack of success, to limit the scope of the definition of mining contained in Section 114(b)(4) (B) here before us. Courts of Appeals in four different federal judicial circuits have uniformly and unhesitatingly rejected such endeavors to narrow the application of the

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<sup>3</sup> Section 29.23(m)-1(f) of Treasury Regulations 111 provides a method for the computation of the gross income as follows:

"If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, 'gross income from the property' means the amount for which such product was sold; but, if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, 'gross income from the property' means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as benefited by the ordinary treatment processes actually applied, before transportation of such product (other than transportation treated for the taxable year, as mining). If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation (other than transportation treated for the taxable year, as mining) and the processes beyond the ordinary treatment processes. . . ."

provision's language. In *United States v. Cherokee Brick & Tile Company*, 5 Cir., 218 F. 2d 424 (1955) the Government [fol. 321] ment urged unsuccessfully that since burnt brick and tile were *manufactured* rather than *mineral* products, the processes by which raw brick and tile clay were transformed into burnt brick and tile could be no part of mining for depletion purposes. The Court of Appeals for the Fifth Circuit held that the processes used to produce the burnt brick and tile were the ordinary treatment processes needed to produce the first commercially marketable products. That court has since reaffirmed its holding in the *Cherokee* case in *United States v. Merry Brothers Brick & Tile Company*, 5 Cir., 242 F. 2d 708 (1957) and, indeed, therein expressly rejected the Government's request that, upon reconsideration and re-examination, it should reverse its previous ruling. The Court of Appeals for the Tenth Circuit, citing the *Cherokee* case, similarly held against the Government in a case also involving brick and tile clay. *United States v. Sapulpa Brick and Tile Corporation*, 10 Cir., 239 F. 2d 694 (1956). In *Dragon Cement Company v. United States*, 1 Cir., 244 F. 2d 513 (1957), the Government contended that cement was a manufactured product which was chemically different in composition from the depletable product, cement rock, and that, therefore, the taxpayer could not use the gross income from sale of cement as its basis for computing percentage depletion. This was rejected by the Court of Appeals for the First Circuit. Finally, in *Townsend v. The Hitchcock Corporation*, 4 Cir., 232 F. 2d 444 (1956), it was held that the grinding and bagging of talc and the cutting of talc into crayons were ordinary treatment processes by which mine owners obtained the commercially marketable products, even though the final products were manufactured.

In all the above cases, the Government's basic contention was that manufacturing processes could not be "ordinary treatment processes" within the meaning of the Code. Likewise, in each of these cases, the Government readily admitted that each taxpayer had no market, or a market for only a negligible quantity, of the particular raw mineral involved; but urged that this fact was of no consequence since the overriding consideration was that

depletion could not be allowed on the sale of manufactured products.

That argument has definitely been laid to rest; the Government has not renewed it before this court. The courts [fol. 322] in the above cases uniformly held that the prime consideration was whether taxpayer applied the normal processes necessary to produce the first commercially marketable product, even though what are usually considered manufacturing processes were applied; and the question was treated as one of fact.

The Government contends that the trial court misinterpreted the above cases as holding that a taxpayer could take depletion on its finished product regardless of whether it was the first commercially marketable product. As it points out, in this case it did not admit the nonmarketability of fire clay and shale. Indeed, the Government's evidence indicates that large quantities of fire clay and shale were sold during the tax year, 1951. Thus, in Indiana, of 82 companies engaged in the production or consumption of fire clay and shale, 32 purchased fire clay or shale, or both, for use in their manufacturing operations. Seven producers of fire clay and two producers of shale in Indiana engaged in nonintegrated operations, that is, strictly in the extraction of the raw fire clay and shale and not in further processing. These companies necessarily took depletion on the raw fire clay and shale which

"The Court of Appeals for the Fifth Circuit stated in *United States v. Cherokee Brick & Tile Company*, *supra* at 435, that:

"\* \* \* [T]he crucial point in this case is one of fact, not of law; and the pleadings admit that fact to be against the Government.

"The complaint alleges that, of the brick and tile clay mined in the United States, there is opportunity for the sale of only a negligible quantity before it is put into the form of burnt brick and tile. This allegation is admitted in the answer of the appellant. For this and other reasons (but mainly for this one) stated in the opinion of the district court, \* \* \* the judgment appealed from should be affirmed."

they sold. Taxpayer's own expert witness, Haydn H. Murray, admitted, on cross-examination, that over 300,000 short tons of fire clay (of some 500,000 short tons produced) were sold in Indiana in 1951 rather than used by the producer in integrated manufacturing operations.

The taxpayer points out that a good percentage of the clay and shale, actually sold, was sold in the Brazil, Indiana area at prices ranging from \$1.60 to \$1.90 per ton delivered in the Brazil area. Taxpayer's mining costs alone, ignoring for the moment the transportation costs which would be an added expense if it sought to sell its raw clay and shale, amounted to \$2.41 per ton. Those [fol. 323] companies selling fire clay in Indiana concerning which the Government introduced evidence fall into two categories. There are those operators who engage primarily in strip mining of coal and, who, during their operations, strip bare so-called underclay which they sell as a by-product. Secondly, there are those which mine underclay which has already been laid bare by previous strip mining operations. The mining costs of such operators would be considerably below those of taxpayer which operated an underground mine. Further, several of the operators of those mines discussed above could not find a market for all the clay which they had available for sale.

We agree with the taxpayer that it did not have a commercially marketable product in its fire clay and shale. We are unable to accept the theory that a taxpayer's depletion allowance is to be computed on the basis of a representative market or field price for a product which taxpayer could not sell at a profit. To do so would be to deprive of all meaning the words "commercially marketable" as used in the Code provision here considered.<sup>5</sup> The

<sup>5</sup> In *Arvonis-Buckingham Slate Company v. United States*, D.C. E.D. Va., 167 F. Supp. 903 (1958) the district court was faced with and rejected the contention that taxpayer involved had a marketable product in unprocessed slate even though the record showed that it was economically unfeasible for taxpayer to mine slate suitable for sale at a profit until it processed the slate into roofing slate shingles. The nature of the seam which taxpayer worked made it necessary for it to blast the slate free and the waste

integrated operations of taxpayer in this case (that is, combined mining and manufacture) were certainly not unique. The evidence the Government used to establish the existence of a market for taxpayer's fire clay indicates, [fol. 324] in fact, that the integrated miner-manufacturer was the rule rather than the exception in Indiana, in 1951. The fact that certain operators of strip mines found it economically feasible to extract and sell fire clay primarily in a limited area near Brazil, Indiana does not alter this picture. Finally, there is no contention that taxpayer applied other than ordinary treatment processes in obtaining its finished products.

In line with its theory that there must be one depletable or commercially marketable product for each mineral, the Government urges that if raw fire clay and shale are not those products for this taxpayer, this case should nevertheless be remanded for further evidence to determine if some other products could have been, with much less processing, the depletable products for this taxpayer. It is suggested that such products could be common brick and

slate, consisting of pieces unsuitable for shingles, sold for only ten cents a ton. In *Riverton Lime and Stone Co. v. Commissioner of Internal Revenue*, 28 T.C. 446, 448 (1957) the Tax Court held that hydrated limestone was taxpayer's first commercially marketable product for "[w]hile it may have been possible to use petitioner's limestone in its quarried state for agricultural purposes, petitioner could not, and did not, sell it in this market because of the abundance of other limestone in the area which was chemically more suited to the farmers' needs." The Government points out in its brief that appeals are now pending from similar adverse holdings in the following cases: *Iowa Limestone Co. v. Commissioner*, 28 T.C. 881 (1957), now pending on appeal to the Eighth Circuit and involving the question of whether crushed rather than pulverized limestone is a taxpayer's first commercially marketable product; *Sparta Ceramic Company v. United States*, D.C.N.D. Ohio, 168 F. Supp. 401 (1958), on appeal to the Sixth Circuit and involving fire clay; and *Pacific Clay Products v. United States*, (S.D. Calif.), decided October 30, 1958, on appeal to the Ninth Circuit and involving both fire clay and brick and tile clay.



ground fire clay.<sup>6</sup> The short answer to this is that we do not agree that it was intended that the depletion allowance for each mineral be reduced to the common denominator represented by a conceivable product most cheaply produced from each mineral. In *United States v. Cherokee Brick & Tile Company*, *supra*, and *United States v. Sapulpa Brick and Tile Corporation*, *supra*, the Fifth and Tenth Circuits, respectively, allowed depletion on both brick and tile. In *Townsend v. The Hitchcock Corporation*, *supra*, both talc powder and talc crayons were treated as depletable products.

This is not to say, of course, that a product may be processed beyond the stage at which it is a commercially marketable product. In *Sparta Ceramic Co. v. United States*, D.C.N.D. Ohio, 168 F. Supp. 401 (1958), the district court recognized this limitation when it refused to allow depletion on the basis of gross income from sales of glazed tile rather than on the representative market price of the unglazed product. Although glazing was accomplished at the time the tile was burnt, about 65% of taxpayer's end product was unglazed and was, in fact, commercially marketable. As the court pointed out, glazing could no more be a necessary treatment process than gold plating, should taxpayer seek to enhance the value of the product by such means. As we have indicated, there is no contention here that the instant taxpayer applied other [fol. 325] than normal treatment processes in obtaining its finished products.

The Government relies on *Riverton Lime and Stone Co. v. Commissioner of Internal Revenue*, 28 T.C. 446 (1957) as authority for the proposition that a small market can establish a representative market or field price for a product. However, in that case it was held merely that, although there were only a few sales of hydrated hydraulic lime in the pure state, the taxpayer could compute its gross income on the market price of that product. Most of taxpayer's sales were of an admixed product rather than a pure product and the Commissioner contended that

<sup>6</sup> There was evidence that taxpayer did sell some 80 tons of ground fire clay at a little more than twenty dollars per ton.



gross income should be computed on the admixed product by the proportionate profits method<sup>7</sup> since the limited market for pure lime established no representative market or field price for pure lime. That case has no bearing on the problem before us since taxpayer here could not and did not sell its raw fire clay or shale prior to processing.

We find nothing in the opinion in *Alabama By-Products Corporation v. Patterson*, 5 Cir., 258 F. 2d 892 (1958) recently handed down by the Court of Appeals for the Fifth Circuit to indicate that that court has modified its earlier holdings in the *Cherokee* and *Merry Brothers* cases. The court merely recognizes in footnote 12 on pages 899-900 of that opinion that neither of those cases involved a question of the existence of a representative market price since in both cases the Government had admitted nonmarketability of the crude brick and tile clay.<sup>8</sup>

The decision of this court in *Zonolite Co. v. United States*, 7 Cir., 211 F. 2d 508 (1954) relied upon by the Government is not controlling here. In that case we held only that income received by taxpayer for transporting its mineral product from the mine to place of sale was not includible in the gross income from "mining." In other words we held that such transportation was beyond ordinary treatment processes since taxpayer's product was [fol. 326] a commercially marketable product before such transportation costs were incurred. The holding in the instant case is entirely consistent with that decision.

The judgment of the district court is

Affirmed.

<sup>7</sup> See Section 29.23(m)-1(f) of Treasury Regulations 111, *supra* note 3.

<sup>8</sup> As the taxpayer points out in its brief, at the time the Government appealed from the district court's holding in the *Merry Brothers* case to the Court of Appeals for the Fifth Circuit, the Government stipulated that five other clay and shale cases should be affirmed if the court adhered to its ruling in the *Cherokee* case. Three of those cases involved fire clay.

[fol. 327] UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT

No. 12496

CANNELTON SEWER PIPE COMPANY, Plaintiff-Appellee,

.vs.

UNITED STATES OF AMERICA, Defendant-Appellant

Appeal from the United States District Court for the  
Southern District of Indiana, Indianapolis Division

JUDGMENT—June 15, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

[fol. 328] Clerk's Certificate Omitted in Printing.

[fol. 329] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1959

No. 513

UNITED STATES OF AMERICA, Petitioner,

vs.

CANNELTON SEWER PIPE COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI—September 10, 1959

Upon consideration of application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 12th, 1959.

Tom C. Clark, Associate Justice of the Supreme  
Court of the United States.

Dated this 10th day of September, 1959.

[fol. 330] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1959

No. 513

UNITED STATES, Petitioner,

vs.

CANNELTON SEWER PIPE COMPANY

ORDER ALLOWING CERTIORARI—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.